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## **Regulating Offshore Energy: Europe as a Model for Regulation**

Alyssa Wright

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# Regulating Offshore Energy: Europe as a Model for Regulation

Alyssa Wright<sup>‡</sup>

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## I. Introduction

In January 2018, the Trump Administration announced that it would open up the coastal waters of the United States to new offshore oil and gas drilling, lifting a ban placed by President

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Obama.<sup>1</sup> Despite the concerns of coastal states<sup>2</sup> impacted by this decision, the Trump Administration plans to move forward with lease sales in twenty-five of twenty-six regions of the Outer Continental Shelf, including areas off the coast of Alaska and California.<sup>3</sup> While this plan has seemingly been put on hold following a federal court decision in Alaska,<sup>4</sup> the Trump Administration has appealed the decision, and it is unclear whether future offshore leases will be permitted in other areas of the country.<sup>5</sup> Despite the Trump Administration's enthusiasm for

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<sup>1</sup> Lisa Friedman, *Trump Moves to Open Nearly All Offshore Waters to Drilling*, N. Y. TIMES (Jan. 4, 2018), <https://www.nytimes.com/2018/01/04/climate/trump-offshore-drilling.html> [<https://perma.cc/FDX3-TBJZ>] [hereinafter Friedman]. For more detail about the proposed plan, see UNITED STATES BUREAU OF OCEAN ENERGY MGMT., 2019-2024 NATIONAL OUTER CONTINENTAL SHELF OIL & GAS LEASING: DRAFT PROPOSED PROGRAM (Jan. 2018), <https://www.boem.gov/NP-Draft-Proposed-Program-2019-2024/> [<https://perma.cc/SG5R-WX38>]. For an overview of the status of the proposed 2019 to 2024 Proposed Program, see CONG. RESEARCH SERV., R44692, FIVE-YEAR OFFSHORE OIL AND GAS LEASING PROGRAM FOR 2019-2024: STATUS AND ISSUES IN BRIEF (2019).

<sup>2</sup> Generally, in this paper, “coastal states” or “states” refer specifically to coastal states or territories of the United States as defined by the Coastal Zone Management Act, whereas “Coastal States” or “States” refer to nations with a coastal boundary, unless context demands otherwise. Under the Coastal Zone Management Act, “coastal states” is defined as “a state of the United States in, or bordering on, the Atlantic, Pacific, or Arctic Ocean, the Gulf of Mexico, Long Island Sound, or one or more of the Great Lakes” as well as the other U.S. island territories. Coastal Zone Management Act, 16 U.S.C. § 1453(4) (2017).

<sup>3</sup> Friedman, *supra* note 1.

<sup>4</sup> Nathan Rott, *Trump Administration Puts Offshore Drilling Plan On Hold After Setback in Court*, NPR (Apr. 25, 2019), <https://www.npr.org/2019/04/25/717214683/trump-administration-puts-offshore-drilling-plan-on-hold-after-setback-in-court> [<https://perma.cc/2DKR-PU46>] [hereinafter Rott]. For the full text of the order, see *League of Conservation Voters v. Trump*, 303 F. Supp. 3d 985 (D. Alaska 2019).

<sup>5</sup> Rott, *supra* note 4; see also Elizabeth Harball, *Trump Administration Appeals Ruling that Blocked Arctic Offshore Drilling*, ALASKA PUB. MEDIA (May 28, 2019), <https://www.alaskapublic.org/2019/05/28/trump-administration-appeals-ruling-that-blocked-arctic-offshore-drilling/> [<https://perma.cc/6P77-SNFC>] (describing the original decision and the filing of the appeal in the Ninth Circuit Court of Appeals). Other actions have been filed by various states and environmental groups against the Trump Administration relating to oil and gas exploration in both inland and offshore areas, including actions filed in opposition against oil and gas leases on public lands in Wyoming, Utah, and Colorado. Nichola Groom, *U.S. Green Groups Ramp Up Legal Attacks on Federal Oil Leases*, REUTERS (June 13, 2019), <https://www.reuters.com/article/us-usa-drilling-protests/u-s-green-groups-ramp-up-legal-attacks-on-federal-oil-leases-idUSKCN1TE1B6> [<https://perma.cc/2WZ5-L6RL>]. A lawsuit filed against the Trump Administration challenges rollbacks of the 2016 Well Control and Blowout Preventer

offshore oil, this plan faces significant opposition from coastal areas.<sup>6</sup> Conversely, the Trump Administration's enthusiasm for offshore drilling does not extend to offshore wind, despite widespread support for offshore wind development among coastal states.<sup>7</sup>

As the possibility of offshore oil and offshore wind energy exploration continues to be debated, issues of how best to regulate offshore drilling and wind in light of shared environmental and economic concerns will arise.<sup>8</sup> Despite these concerns, some states and other countries are continuing to expand both offshore wind and offshore oil operations, while others move to delay or cease offshore energy exploration altogether.<sup>9</sup>

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Rule, which was implemented after the Deepwater Horizon oil spill in 2010. Liz Trotter, *Lawsuit Challenges Trump Administration's Rollbacks of Offshore Drilling Safety Regs*, EARTHJUSTICE (June 11, 2019), <https://earthjustice.org/news/press/2019/lawsuit-challenges-trump-administration-s-rollbacks-of-offshore-drilling-safety-regs> [https://perma.cc/4GDT-3XJY]. Several coastal states have joined a lawsuit seeking to block seismic testing in the Atlantic Ocean. Darryl Fears, *Nine State Attorneys Join Lawsuit Opposing Air Guns to Search for Oil in the Atlantic*, WASH. POST (Dec. 20, 2018), <https://www.washingtonpost.com/energy-environment/2018/12/20/nine-state-attorneys-join-lawsuit-opposing-airguns-search-oil-atlantic/> [https://perma.cc/R9JW-M54V].

<sup>5</sup> Friedman, *supra* note 1.

<sup>6</sup> *Id.*

<sup>7</sup> See Benjamin Storrow, *Trump Admin Throws Wrench into Offshore Wind Plans*, E&E NEWS (Aug. 12, 2019), <https://www.eenews.net/stories/1060921573> [https://perma.cc/GJ4Z-M3J4].

<sup>8</sup> Friedman, *supra* note 1.

<sup>9</sup> See, e.g., Robert Walton, *Connecticut Issues Draft RFP for 2 GW Offshore Wind*, UTILITY DIVE (July 8, 2019), [https://perma.cc/Q8AT-MXVA] (describing Connecticut's request for proposals to develop an offshore wind farm by the end of 2026); Cheri Carlson, *State Ends Offshore Oil, Gas Leases; Company Says 50 Employees May Lose Jobs*, VC STAR (July 5, 2019), <https://www.vcstar.com/story/news/special-reports/outdoors/2019/07/05/offshore-oil-gas-leases-ventura-santa-barbara-coast/1630906001/> [https://perma.cc/2VC3-N9NM] (discussing oil and gas leases off the coast of Santa Barbara and Ventura counties which were terminated by the California State Lands Commission); David Weston, *The Hot and Cold Markets of 2019 So Far*, WINDPOWER MONTHLY (July 4, 2019), <https://www.windpowermonthly.com/article/1590071/hot-cold-markets-2019-so-far> [https://perma.cc/3VTV-PBA5] (describing global market trends in the first half of 2019); Mary B. Powers et. al., *U.S. Offshore Wind Project Awards Push Market Boundaries*, ENGINEERING NEWS-RECORD (July 3, 2019), <https://www.enr.com/articles/47137-us-offshore-wind-project-awards-push-market-boundaries> [https://perma.cc/7YJF-2FY9] (describing proposed offshore wind projects in several US states); Vanessa Bates Ramirez, *The Biggest Offshore Wind Project in the US is Underway*, SINGULARITYHUB (June 28, 2019), <https://singularityhub.com/2019/06/28/the-biggest-offshore-wind-project-in-the->

The decision to open up offshore lands to leasing comes as part of President Trump's ongoing effort to encourage the development of energy production while reducing the regulatory burdens of developing those resources.<sup>10</sup> Notably, as directed by the President in Executive Order ("EO") 13,795 in April 2017,<sup>11</sup> the Trump Administration prioritizes an "America-First Offshore Energy Strategy" to "maintain the Nation's position as a global energy leader and foster energy security and resilience for the benefit of the

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us-is-officially-underway/ [https://perma.cc/D6Z8-MP7W] (describing recent developments concerning projects in the US and the EU to expand offshore wind capacity); Staff Report, *Offshore Wind Lease Area Surveys Underway*, COASTAL REV. ONLINE (June 27, 2019), <https://www.coastalreview.org/2019/06/offshore-wind-lease-area-surveys-underway/> [https://perma.cc/EC97-2Y3X] (discussing geographic surveys occurring near Kitty Hawk, North Carolina, to pursue the development of an offshore wind farm in the region based on a federal land lease); *US Offshore Wind Market Doubles in Size*, OFFSHORE ENGINEER (June 25, 2019), <https://www.oedigital.com/news/467694-us-offshore-wind-market-doubles-in-size> [https://perma.cc/5B8Y-UQK9] (discussing the expansion of the market for offshore wind in the United States since 2018); Ali Akhyari, *Federal Agency Looking at South Carolina Coast for Wind Energy*, SOUTH STRAND NEWS (June 22, 2019), [https://www.southstrandnews.com/news/federal-agency-looking-at-south-carolina-coast-for-wind-energy/article\\_3857c00c-92d0-11e9-a603-9fb534d2e4bb.html](https://www.southstrandnews.com/news/federal-agency-looking-at-south-carolina-coast-for-wind-energy/article_3857c00c-92d0-11e9-a603-9fb534d2e4bb.html) [https://perma.cc/GYG9-CL2Z] (discussing BOEM's ongoing assessment of offshore wind capacity in areas along North Carolina, South Carolina, Georgia, and Florida coasts); Jack Unwin, *Energy Ministers to Extend Offshore Wind Cooperation in North Sea*, POWER TECH. (June 21, 2019), <https://www.power-technology.com/news/offshore-wind-north-sea-agreement/> [https://perma.cc/V4Q3-4X9X] (discussing an agreement between North Sea countries to increase collaboration in order to reduce costs and increase offshore wind capacity); Walter Cruickshank, *Path Forward for Offshore Wind Leasing on OCS*, WORKBOAT (June 12, 2019), <https://www.workboat.com/blogs/maritime-matters/path-forward-for-offshore-wind-leasing-on-ocs/> [https://perma.cc/9LD9-BCVU] (describing BOEM's "Proposed Path Forward for Future Offshore Renewable Energy Leasing on the Atlantic Outer Continental Shelf"); Clifford Krauss & Declan Walsh, *Egypt Looks to Offshore Gas Field for Growth and Influence*, N.Y. TIMES (Mar. 11, 2019), <https://www.nytimes.com/2019/03/11/business/energy-environment/egypt-gas.html> [https://perma.cc/F3AC-29M5] (describing how the discovery of oil in the Mediterranean is seen as a potential windfall to the Egyptian economy); *The Wind Energy Capacity in 2018*, REVE (June 21, 2018), <https://www.evwind.es/2019/06/21/at-least-103-countries-have-commercial-wind-energy-capacity/67662> [https://perma.cc/8UYF-BFBF] (discussing an increase in overall wind capacity in 2018, including offshore).

<sup>10</sup> See Sam Pickerill, *Brief: Implementing an America-First Offshore Energy Strategy (Executive Order 13795)*, DUKE SCIPOL (July 21, 2017), <https://scipol.duke.edu/track/dcpd-201700287-executive-order-13795-implementing-america-first-offshore-energy-strategy> [https://perma.cc/TTU3-2T5E] [hereinafter Pickerill].

<sup>11</sup> Exec. Order No. 13,795, 82 Fed. Reg. 20,815, 20,815 (Apr. 28, 2017).

American people.”<sup>12</sup> In this Executive Order, the President directed the Secretary of Commerce to streamline permitting of seismic research and refrain from designating National Marine Sanctuaries unless there is a full accounting of energy potential within the designated area, including energy from wind, oil, gas, or other resources.<sup>13</sup> The Executive Order further instructed the Secretary of the Interior to examine various regulatory regimes under other federal agencies to review, revise, and withdraw proposed regulations, as well as to expedite requests related to marine mammal protection.<sup>14</sup> The Secretary of the Interior subsequently released Secretary’s Order 3,350, which indicated that, in order to implement EO 13,795, the Bureau of Ocean Energy Management (“BOEM”) would rescind the previous 2017-2022 Outer Continental Shelf Oil and Gas Leasing Program, which excluded lease sales in the Atlantic and off the coast of Alaska.<sup>15</sup>

The regulatory scheme of offshore oil and gas implicates both federal and state interests.<sup>16</sup> While some parties are in support of the proposals by the Trump Administration, there is significant opposition among coastal states that may be affected by this plan.<sup>17</sup> Outside of the coastal states directly affected, members of the

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<sup>12</sup> *Id.*

<sup>13</sup> *Id.* § 4.

<sup>14</sup> *See id.* §§ 6 – 11; *see also* Pickerill, *supra* note 10.

<sup>15</sup> SEC’Y OF THE INTERIOR, ORDER NO. 3,350, U.S. DEP’T OF INTERIOR, at 2, <https://www.doi.gov/sites/doi.gov/files/press-release/secretarial-order-3350-offshore-508.pdf> [<https://perma.cc/CX5F-R72H>]. *See also* Press Release, U.S. Dep’t of Interior, Secretary Zinke Signs Orders Implementing America-First Offshore Energy Strategy (May 2, 2017), <https://www.doi.gov/pressreleases/secretary-zinke-signs-orders-implementing-america-first-offshore-energy-strategy> [<https://perma.cc/TTK3-ECB4>] (describing the context of the signing of Secretary’s Order 3350).

<sup>16</sup> *See* Pickerill, *supra* note 10 (explaining that the Outer Continental Shelf is under both state and federal jurisdiction).

<sup>17</sup> *See* Friedman, *supra* note 1 (describing coastal governor’s opposition to offshore drilling plans); *see also* Hiroko Tabuchi, *Trump Administration Drops Florida From Offshore Drilling Plan*, N.Y. TIMES (Jan. 9, 2018), <https://www.nytimes.com/2018/01/09/climate/trump-florida-offshore-drilling.html> [<https://perma.cc/W9DW-UP4Z>] (describing an agreement between the ex-Secretary of the Interior and ex-governor of Florida not to consider Florida for any new offshore oil and gas platforms); Rosanna Xia, *Gov. Brown Signs Bills to Block Trump’s Offshore Oil Drilling Plan*, L.A. TIMES (Sept. 8, 2018), <http://www.latimes.com/local/lanow/la-me-offshore-drilling-20180908-story.html> [<https://perma.cc/5HFE-GT9Q>] (describing two bills signed by California Governor Jerry Brown which block new offshore drilling in California).

American public are increasingly opposed to allowing more offshore oil and gas drilling in the United States' waters, according to Pew Research Center.<sup>18</sup> Even though opposition increases with proximity to the coast, 51% of the American public<sup>19</sup> oppose increased offshore drilling, compared to 42% who favor it.<sup>20</sup> Of Americans who live within 25 miles of a coastline, 56% of people oppose increased offshore and gas drilling, compared to only 34% who favor it.<sup>21</sup> Polling conducted by Gallup indicates that the American public favors protecting the environment over production of traditional energy sources including oil, natural gas, and coal, with 59% favoring the environment.<sup>22</sup> Likewise, 71% of Americans believe that the United States should rely on alternative energy sources instead of oil, gas, and coal.<sup>23</sup> The issue carried into the 2018 midterm elections, where candidates from both parties in coastal states responded to public opposition to offshore drilling and seismic testing by switching their policy positions to align with the proposal's opposition.<sup>24</sup> As recently as May 2019, a survey

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<sup>18</sup> Bradley Jones, *More Americans Oppose than Favor Increased Offshore Drilling*, PEW RESEARCH CTR. (Jan. 30, 2018), <http://www.pewresearch.org/fact-tank/2018/01/30/more-americans-oppose-than-favor-increased-offshore-drilling/> [https://perma.cc/ZMS4-CRSH] [hereinafter Jones].

<sup>19</sup> The "American public," in this instance, consists of persons sampled by Pew Research Center, which sampled 1,503 adults in all 50 states and D.C., weighed according to the 2016 American Community Survey. For more on the methodology used, see *Methodology*, PEW RESEARCH CTR. (2018), <https://www.pewresearch.org/wp-content/uploads/2018/01/1-29-18-offshore-drilling-methodology.pdf> [https://perma.cc/KV6P-2VWE].

<sup>20</sup> Jones, *supra* note 18.

<sup>21</sup> *Id.*

<sup>22</sup> RJ Reinhart, *In the News: Offshore Drilling*, GALLUP (Jan. 5, 2018), <https://news.gallup.com/poll/225053/news-offshore-drilling.aspx> [https://perma.cc/8HCV-VVH7].

<sup>23</sup> *Id.*

<sup>24</sup> Madeleine Carlisle, *Trump's Offshore-Drilling Plan is Roiling Coastal Elections*, THE ATLANTIC (Aug. 5, 2018), <https://www.theatlantic.com/politics/archive/2018/08/trumps-offshore-drilling-plan-is-roiling-coastal-elections/566726/> [https://perma.cc/U9TD-286A]. One example where the issue of offshore drilling impacted the 2018 Midterms: 69% of Florida voters passed Amendment 9 to the Florida constitution, which bans both indoor vaping and offshore drilling between 3 to 9 miles off the coast. Steve Patterson, *Rutherford Aims to Ban Offshore Drilling Around Florida*, FLA. TIMES-UNION (June 28, 2019), <https://www.jacksonville.com/news/20190628/rutherford-aims-to-ban-offshore-drilling-around-florida> [https://perma.cc/ZU2A-FN43]; A.G. Gancarski, *U.S. House "BEACHES Act" Would Ban Offshore Florida Drilling*, FLA. POLS. (June 28, 2019),

conducted in North Carolina's 3rd Congressional District<sup>25</sup> revealed that 62.8% of respondents "want the government to reduce regulation in order to allow for more offshore wind development[.]"<sup>26</sup> and 38.8% of respondents "strongly oppose any offshore drilling, while just 24% strongly support it."<sup>27</sup> The public opposition to offshore drilling has translated into laws and regulations at the state and national levels, as many coastal states push back against offshore drilling.<sup>28</sup>

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<https://floridapolitics.com/archives/300011-u-s-house-beaches-act-would-ban-offshore-florida-drilling> [<https://perma.cc/G9QC-WQX4>].

<sup>25</sup> North Carolina's 3rd Congressional District consists of all or parts of Currituck, Camden, Pasquotank, Perquimans, Chowan, Tyrrell, Dare, Hyde, Beaufort, Pamlico, Carteret, Pitt, Craven, Onslow, Jones, Lenoir, and Greene counties. Staff Report, *Poll: Wind Favored Over Offshore Drilling*, COASTAL REV. ONLINE (July 2, 2019), <https://www.coastalreview.org/2019/07/poll-wind-favored-over-offshore-drilling/> [<https://perma.cc/B82C-7B5Q>]. These counties overlap with most of the counties that fall under North Carolina's Coastal Area Management Act jurisdiction, which consists of 20 coastal counties. See *About Coastal Management*, N.C. DEP'T OF ENVTL. QUALITY, <https://deq.nc.gov/about/divisions/coastal-management/about-coastal-management> [<https://perma.cc/VUC5-LJBM>]; *CAMA Counties*, N.C. DEP'T OF ENVTL. QUALITY, <https://deq.nc.gov/about/divisions/coastal-management/about-coastal-management/cama-counties> [<https://perma.cc/W49K-DGDS>].

<sup>26</sup> *Polling Memo*, OUTER BANKS CHAMBER OF COMMERCE ET. AL. (June 28, 2019), <https://drive.google.com/file/d/1y7nFIwcRQQBrJhMeT1ZV5OOam2q2a75v/view> [<https://perma.cc/474T-JPD5>]; see also Ginger Livingston, *3rd District Voters Oppose Offshore Drilling*, REFLECTOR (July 7, 2019), <http://www.reflector.com/News/2019/07/07/3rd-District-voters-oppose-offshore-drilling.html> [<https://perma.cc/HX9G-QMSA>]; Staff Report, *Poll: Wind Favored Over Offshore Drilling*, COASTAL REV. ONLINE (July 2, 2019), <https://www.coastalreview.org/2019/07/poll-wind-favored-over-offshore-drilling/> [<https://perma.cc/C6JU-DE89>].

<sup>27</sup> *Id.*

<sup>28</sup> See, e.g., Bo Peterson, *SC DHEC Says No to Offshore Oil Exploration Company as Incompatible to Coast*, POST & COURIER (July 8, 2019), [https://www.postandcourier.com/news/sc-dhec-says-no-to-offshore-oil-exploration-company-as/article\\_7b0b7ed2-a1af-11e9-abbe-5bdd79b1ae3b.html](https://www.postandcourier.com/news/sc-dhec-says-no-to-offshore-oil-exploration-company-as/article_7b0b7ed2-a1af-11e9-abbe-5bdd79b1ae3b.html) [<https://perma.cc/W7EZ-HRBE>] (describing a determination by South Carolina's Department of Health and Environmental Control to deny certification of an oil company's proposed seismic testing for the purposes of finding oil deposits off the coast as inconsistent with South Carolina's Coastal Zone Management Act); Kevin Frey, *US House Votes to Block Offshore Drilling off Atlantic Coast*, SPECTRUM NEWS (June 25, 2019), <https://spectrumlocalnews.com/nc/triangle-sandhills/politics/2019/06/25/us-house-votes-to-block-offshore-drilling-off-atlantic-coast> [<https://perma.cc/3C9L-MMD4>] (discussing a proposed amendment in the United States House of Representatives blocking offshore exploration on the Atlantic coast); JoAnn Merrigan, *Bill Would Ban Offshore Drilling*, WSAV3 (June 20, 2019), <https://www.wsav.com/news/bill-would-ban-offshore-drilling/>



According to the International Energy Agency (“IEA”), more than a quarter of today’s oil and gas supply is produced offshore.<sup>29</sup> Globally, although offshore oil production has remained stable since 2000, the production of natural gas from offshore sources has increased by 50%, as has production of offshore electricity generation from offshore wind.<sup>30</sup> Within the United States, deepwater oil production<sup>31</sup> increased by 25% between 2005 and 2015.<sup>32</sup> Globally, offshore oil production accounted for 30% of total oil production between 2005 and 2015.<sup>33</sup> As of 2016, the United States and Brazil accounted for more than 90% of the ultra-deepwater<sup>34</sup> production.<sup>35</sup>

Although the 2010 Deepwater Horizon oil spill in the Gulf of

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[<https://perma.cc/8K4F-HFN9>] (discussing legislation introduced into Congress from a South Carolina representative); Staff Report, *DCM Objects to Company’s Seismic Plan*, COASTAL REV. ONLINE (June 12, 2019), <https://www.coastalreview.org/2019/06/breaking-dcm-objects-to-seismic-plan/> [<https://perma.cc/MWN6-N3BR>] (discussing the North Carolina Division of Coastal Management’s opposition to seismic testing for feasibility studies for offshore oil and gas drilling); Rachel Ellis, *Lowcountry Mayors Sign Letter to DHEC Opposing Seismic Testing and Offshore Drilling*, ABC4NEWS (June 11, 2019), <https://abcnews4.com/news/local/lowcountry-mayors-sign-letter-to-dhec-opposing-seismic-testing-and-offshore-drilling> [<https://perma.cc/JNV7-AP5S>] (discussing a letter from coastal mayors in SC which expresses opposition to both seismic testing and offshore drilling); Dan Hunt, *SC Places Temporary Ban On Offshore Drilling Permits*, BLUFFTON TODAY (May 31, 2019), <https://www.blufftontoday.com/news/20190531/sc-places-temporary-ban-on-offshore-drilling-permits> [<https://perma.cc/5YKQ-WS9S>] (discussing a budget proviso in South Carolina which bans offshore drilling in the state for the next fiscal year); Jessica Weiss, *The Trump Administration Wants Offshore Drilling in Florida. The Majority of Floridians Oppose It*, WLRN (Apr. 14, 2019), <https://www.wlrn.org/post/trump-administration-wants-offshore-drilling-florida-majority-floridians-oppose-it> [<https://perma.cc/E3BL-UR26>] (discussing opposition to offshore drilling in Florida).

<sup>29</sup> TORD BJORNDALE ET AL., OFFSHORE ENERGY OUTLOOK, INT’L ENERGY AGENCY (2018), [https://www.iea.org/publications/freepublications/publication/WEO2017Special\\_Report\\_OffshoreEnergyOutlook.pdf](https://www.iea.org/publications/freepublications/publication/WEO2017Special_Report_OffshoreEnergyOutlook.pdf) [<https://perma.cc/L8HK-MHYU>] [hereinafter OFFSHORE ENERGY OUTLOOK].

<sup>30</sup> *Id.*

<sup>31</sup> Defined as oil production in waters of depths greater than 125 meters. Matthew Manning, *Offshore Oil Production in Deepwater and Ultra-Deepwater is Increasing*, U.S. ENERGY INFO. ADMIN. (Oct. 28, 2016), <https://www.eia.gov/todayinenergy/detail.php?id=28552> [<https://perma.cc/D5BL-25X4>].

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> Defined as oil production at depths more than 1,500 meters. *See id.*

<sup>35</sup> *Id.*

Mexico resulted in a major upset in the offshore drilling industry<sup>36</sup> and the implementation of new rules, including a European Union (“EU”) Directive for offshore drilling safety and environmental protection measures,<sup>37</sup> the IEA predicts that offshore energy activity will increase in any projection scenario.<sup>38</sup> Research by the IEA further indicates that there are long-term risks related to natural gas and oil regarding demand and stability, as well as risks associated with a shift towards sustainable development.<sup>39</sup> Although offshore wind presents risks relating to policy frameworks and long-term purchase agreements, potential solutions are quicker to develop than oil and gas and offer fewer environmental concerns.<sup>40</sup> Relating to these uncertainties in the offshore energy sector, the IEA suggests that “potential synergies” exist between various offshore energy projects.<sup>41</sup> The IEA further notes that there is significant potential for the development of offshore wind along the coast of the United States, noting that development has been slow to take off for various reasons, including delays on leasing and regulations.<sup>42</sup>

This paper will proceed in six parts. Part I will examine the international laws that currently regulate offshore resource extraction, particularly related to offshore oil and gas. Part II will examine the mechanisms employed by the European Union as a model for successful regulation. Part III will examine the structures regulating offshore energy development in the United States, largely focusing on the federal laws that address areas of concern in relation to offshore energy exploration, development, and extraction. Part IV will discuss recent developments in the United States ocean policy under the Obama and Trump Administrations. Part V will propose ways that the United States could incorporate elements of the European model of regulations into the current regulatory scheme around offshore energy. Part VI concludes.

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<sup>36</sup> *Id.*

<sup>37</sup> See generally *Offshore Oil and Gas Safety*, EUROPEAN COMM’N (last updated Aug. 22, 2019), <https://ec.europa.eu/energy/en/topics/oil-gas-and-coal/offshore-oil-and-gas-safety> [<https://perma.cc/JUV4-YZVM>] (describing the EU’s efforts to implement safety standards for offshore drilling following the Deepwater Horizon oil spill) [hereinafter *Offshore Oil and Gas Safety*].

<sup>38</sup> OFFSHORE ENERGY OUTLOOK, *supra* note 29, at 14–15.

<sup>39</sup> *Id.* at 52.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 38.

## II. International and Regional Law

There are no treaties that set international standards for offshore drilling.<sup>43</sup> Despite the regulatory gap at the international level, some sources of international law specifically address the regulation of international waters. Notably, the United Nations Convention on the Law of the Sea (“UNCLOS”) defines the limits within which nations have sovereignty and creates a framework within which countries manage marine resources.<sup>44</sup> Under UNCLOS, Coastal States have sovereignty over the territorial sea, which extends out to 12 nautical miles.<sup>45</sup> Furthermore, beyond the territorial sea, Coastal States have sovereignty up to 200 nautical miles in an area known as the exclusive economic zone (“EEZ”).<sup>46</sup> Within the EEZ, Coastal States have sovereign rights for “exploring and exploiting, conserving, and managing the natural resources,” which include the production of energy.<sup>47</sup> Coastal States exercise sovereign rights to explore and exploit natural resources, including “mineral and other non-living resources of the seabed and subsoil together with living organisms[.]”<sup>48</sup> Coastal States have the exclusive right to authorize and regulate drilling on the continental shelf.<sup>49</sup> Despite the

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<sup>43</sup> Julien Rochette & Glen Wright, *Brief for GSDR 2015: Strengthening the International Regulation of Offshore Oil and Gas Activities*, IDDRI SCI. PO (Feb. 14, 2014), [https://sustainabledevelopment.un.org/content/documents/5779Brief%20offshore%20GSDR\\_rev.pdf](https://sustainabledevelopment.un.org/content/documents/5779Brief%20offshore%20GSDR_rev.pdf) [<https://perma.cc/4TJ9-CMZ7>].

<sup>44</sup> See generally United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

<sup>45</sup> *Id.* arts. 2, 3.

<sup>46</sup> *Id.* art. 55.

<sup>47</sup> *Id.* art. 56.

<sup>48</sup> *Id.* art. 77.

<sup>49</sup> *Id.* art. 81. The continental shelf is defined as “the seabed and the subsoil of the submarine areas that extend beyond [the coastal state’s] territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.” UNCLOS, *supra* note 44, art. 76. In the United States, the “outer continental shelf” is defined as “all submerged lands lying seaward and outside of the area of lands beneath navigable waters [ ] and of which the subsoil and seabed appertain to the United States and are subject to its jurisdiction and control[.]” Outer Continental Shelf Lands Act, 43 U.S.C. § 1331(a) (2017). Geologically, the continental shelf is defined as the “edge of a continent that lies under the ocean[.]” which “extends from the coastline of a continent to a drop-off point called the shelf break.” Kim Rutledge et al., *Continental Shelf*, NAT’L GEOGRAPHIC (Mar. 4, 2011),

recognition of Coastal States' sovereignty over territorial waters, the EEZ, and the continental shelf, UNCLOS nonetheless requires that "necessary measures" be taken by Coastal States to prevent, reduce, and control pollution, and protect the marine environment from harm relating to drilling or related activities.<sup>50</sup>

Beyond this recognition of sovereignty, international treaties specifically address marine pollution. The United Nations Convention on the Prevention of Pollution from Ships of 1973<sup>51</sup> ("MARPOL") and the Protocol of 1978 relating to the Convention of 1973 ("MARPOL Protocol") create an international regulatory regime for managing pollution from ships and offshore drilling rigs.<sup>52</sup> The MARPOL Protocol requires that offshore drilling rigs, whether fixed or floating, comply with regulations such as monitoring, record-keeping, and reporting to the Coastal State under which the drilling rig operates.<sup>53</sup> This notwithstanding, the onus of implementation rests with the signatory nations.

Beyond MARPOL, the International Convention on Oil Pollution Preparedness, Response and Cooperation of 1990 ("OPRC") sets up measures relating to the prevention of oil pollution for signatory nations to "prepare for and respond to an oil pollution incident."<sup>54</sup> The requirements are broad, leaving discretion to signatory nations, but establishing baseline requirements that signatories have oil pollution plans and reporting mechanisms, as well as encouraging international cooperation on the matter.<sup>55</sup> Some key provisions of OPRC require that signatory nations require operators of offshore units to have oil pollution

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<https://www.nationalgeographic.org/encyclopedia/continental-shelf/> [https://perma.cc/N3YD-VA6X]. For purposes of this paper, the "continental shelf" will be defined by the UNCLOS definition, which addresses the jurisdiction of coastal States in managing their coastal areas.

<sup>50</sup> UNCLOS, *supra* note 44, art. 145.

<sup>51</sup> *See generally* International Convention on the Prevention of Pollution from Ships, 1973, 1340 U.N.T.S. 184.

<sup>52</sup> *See generally* Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, Feb. 17, 1978, 1340 U.N.T.S. 62.

<sup>53</sup> *Id.* regs. 21, 16, 17.

<sup>54</sup> International Convention on Oil Pollution Preparedness, Response and Cooperation art. 1, Nov. 30, 1990, 1891 U.N.T.S. 78 [hereinafter OPRC].

<sup>55</sup> *See id.* PmbL.

emergency plans,<sup>56</sup> report oil discharge incidents,<sup>57</sup> evaluate discharge reports,<sup>58</sup> create a national system for responding to incidents,<sup>59</sup> and cooperate with other signatory states or the International Maritime Organization<sup>60</sup> to respond to incidents.<sup>61</sup>

A final notable international treaty on offshore drilling is the Convention for the Protection of the Marine Environment of the North-East Atlantic (“OSPAR”).<sup>62</sup> OSPAR is a treaty between fifteen countries in the North Atlantic, most of which are European, and the EU itself.<sup>63</sup> Decisions that are adopted by the OSPAR Commission are legally binding on all contracting parties and are complemented by agreements that discuss issues of importance, programs of monitoring and data collection, guidance for implementation, and actions taken by the OSPAR Commission.<sup>64</sup> The OSPAR Commission publishes reports, evaluations, and assessments of OSPAR implementation based on data reported by contracting parties.<sup>65</sup> Beyond the OSPAR Commission, the OSPAR Secretariat manages and coordinates the work and reporting of contracting parties, as well as the meeting schedule of OSPAR.<sup>66</sup> Additional OSPAR Committees and Working Groups handle the practical implementation of strategies and allow observer organizations to take an active part in the process.<sup>67</sup>

Since entering into effect in 1992, the OSPAR Convention has

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<sup>56</sup> *Id.* art. 3.

<sup>57</sup> *Id.* art. 4.

<sup>58</sup> *Id.* art. 5.

<sup>59</sup> *Id.* art. 6.

<sup>60</sup> The International Maritime Organization, or IMO, is an agency within the United Nations that acts as a “standard-setting authority for the safety, security and environmental performance of international shipping[,]” and “create[s] a regulatory framework for the shipping industry that is fair and effective, universally adopted and universally implemented.” *Introduction to IMO*, INT’L MAR. ORG., <http://www.imo.org/en/About/Pages/Default.aspx> [<https://perma.cc/K93T-K7PG>].

<sup>61</sup> OPRC, *supra* note 54, art. 7.

<sup>62</sup> *See generally* *OSPAR Convention*, OSPAR COMM’N, <https://www.ospar.org/convention> [<https://perma.cc/YJ6Y-A8KW>].

<sup>63</sup> *Id.*

<sup>64</sup> *How OSPAR Works*, OSPAR COMM’N, <https://www.ospar.org/about/how> [<https://perma.cc/5AAZ-H7DX>].

<sup>65</sup> *See id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

developed programs and measures in “all phases of offshore oil and gas activities[.]”<sup>68</sup> OSPAR’s goal relating to offshore oil and gas “is to prevent and eliminate pollution and . . . to protect . . . against the adverse effects of offshore activities[.]”<sup>69</sup> Data collected by OSPAR between 2009 and 2014 show that there has been a decrease in discharges of hydrocarbons and hazardous offshore chemicals, despite decreasing trends in the production of oil in the OSPAR area, continuing a pattern of successful implementation of OSPAR measures.<sup>70</sup> However, it is difficult to determine trends relating to quantities of chemicals spilled, the number of oil spills, and the quantity of oil spilled, due to the infrequent nature of spill events.<sup>71</sup> Other OSPAR recommendations have unclear results, including a 2012 recommendation for a Risk-Based Approach to managing water discharges, due to its short implementation time.<sup>72</sup>

OSPAR utilizes an ecosystem-based approach to evaluate the cumulative effects of human impacts in the OSPAR area.<sup>73</sup> OSPAR defines the ecosystem approach as:

[T]he comprehensive integrated management of human activities based on the best available scientific knowledge about the ecosystem and its dynamics, to identify and take action on influences which are critical to the health of marine ecosystems, thereby achieving sustainable use of ecosystem goods and services and maintenance of ecosystem integrity.<sup>74</sup>

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<sup>68</sup> See *Trends in Discharges, Spills and Emissions from Offshore Oil and Gas Installations*, OSPAR COMM’N, (2017), <https://oap.ospar.org/en/ospar-assessments/intermediate-assessment-2017/pressures-human-activities/trends-discharges-spills-and-emissions-offshore-oil-and-gas-inst/> [https://perma.cc/YM2T-SK6T].

<sup>69</sup> *Id.*

<sup>70</sup> See *id.*

<sup>71</sup> See *id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Ecosystem Assessment Outlook – Developing an Approach to Cumulative Effects Assessment for the QSR*, OSPAR COMM’N (2017), <https://oap.ospar.org/en/ospar-assessments/intermediate-assessment-2017/chapter-6-ecosystem-assessment-outlook-developing-approach-cumul/> [https://perma.cc/24XR-R9WZ] [hereinafter *Ecosystem Assessment Outlook*].

<sup>74</sup> *Ecosystem Approach*, OSPAR COMM’N, <https://www.ospar.org/about/principles/ecosystem-approach> [https://perma.cc/RW2L-EJN6] [hereinafter *Ecosystem Approach*].

This ecosystem-based approach enables OSPAR to integrate different conservation and management approaches, including marine protected areas and existing legal frameworks.<sup>75</sup> OSPAR recognizes that this method of evaluation “cuts across the work of all OSPAR committees and expert groups” and that this kind of assessment should be “embedded within the OSPAR structural framework and make[] best use of the available data and expertise.”<sup>76</sup>

Although the 2017 Intermediate Assessment did not include an evaluation of ecosystem health, OSPAR described how the next Quality Status Report would incorporate cumulative effects assessments based on indicators of environmental health, including biodiversity and climate change.<sup>77</sup> This approach will enable OSPAR to better evaluate causal factors related to ecosystem trends to inform OSPAR decisions.<sup>78</sup> Specifically, OSPAR focuses on four programmatic measurements: (1) promoting understanding and acceptance of the ecosystem approach; (2) monitoring marine ecosystems; (3) setting objectives for environmental quality based on that monitoring; and (4) assessing the direct and indirect impact of human activities on the living and non-living marine environment.<sup>79</sup>

Beyond these treaties, there is an international push to encourage countries to adopt maritime or marine spatial planning<sup>80</sup> efforts as part of the 2030 Agenda for Sustainable Development,<sup>81</sup> adopted by the UN General Assembly in 2015.<sup>82</sup> The UNESCO

<sup>75</sup> *Id.*

<sup>76</sup> *Ecosystem Assessment Outlook*, *supra* note 73.

<sup>77</sup> *See id.*

<sup>78</sup> *See id.*

<sup>79</sup> *See Ecosystem Approach*, *supra* note 74.

<sup>80</sup> Throughout this paper, “maritime spatial planning” and “marine spatial planning” will be used interchangeably. Maritime/marine spatial planning, or MSP, “works across borders and sectors to ensure human activities at sea take place in an efficient, safe[,] and sustainable way.” *Maritime Spatial Planning*, EUR. COMM’N, [https://ec.europa.eu/maritimeaffairs/policy/maritime\\_spatial\\_planning\\_en](https://ec.europa.eu/maritimeaffairs/policy/maritime_spatial_planning_en) [<https://perma.cc/A9PE-FRP5>].

<sup>81</sup> MSPGLOBAL, <http://www.mspsglobal2030.org/msp-global/> [<https://perma.cc/DJ54-NFYL>].

<sup>82</sup> G.A. Res. 70/1, Transforming Our World: the 2030 Agenda for Sustainable Development (Oct. 21, 2015). Goal 14 of the 2030 Agenda for Sustainable Development, “Life Below Water,” sets various goals for the conservation and sustainable use of the oceans, seas, and marine resources. *Id.* at 23–24.

Intergovernmental Oceanographic Commission (“IOC-UNESCO”) has promoted “the development of management procedures and policies leading to the sustainability of marine environments[.]” starting with a 2006 International Workshop on the use of marine spatial planning “as a tool to implement ecosystem-based, sea use management.”<sup>83</sup> This subsequently led to the publication of “Marine Spatial Planning: A Step by Step Approach” in 2009, “which rapidly became an internationally-recognized standard” to the planning, implementation, monitoring, and evaluation of marine spatial planning (“MSP”) programs.<sup>84</sup> The Step by Step guide describes MSP as “a practical way to create and establish a more rational organization of the use of marine space and the interactions between its uses, to balance demands for development with the need to protect marine ecosystems, and to achieve social and economic objectives in an open and planned way.”<sup>85</sup> The guide recognizes that most countries already have some form of marine zone designations based on human activities, but notes that “usually this is done on a sector-by-sector, case-by-case basis without much consideration of effects either on other human activities or the marine environment[.]” leading to conflicts between different human uses and the environment.<sup>86</sup> The guide notes several characteristics of effective marine spatial planning: ecosystem-based, integrated, place- or area-based, adaptive, strategic and anticipatory, and participatory.<sup>87</sup> The broad goal is for the development of a marine spatial plan to be a “continuing, iterative process that learns and adapts over time”<sup>88</sup> and to create a “future-oriented process” wherein decision makers can address different use conflicts rather than merely react to events.<sup>89</sup> While not a binding legal goal, roughly seventy countries have implemented MSP initiatives to various degrees, according to the IOC-UNESCO.<sup>90</sup>

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<sup>83</sup> *MSP at IOC-UNESCO*, MARINE SPATIAL PLANNING PROGRAMME, <http://msp.ioc-unesco.org/about/msp-at-unesco/> [<https://perma.cc/X8MN-4BAB>].

<sup>84</sup> *Id.*

<sup>85</sup> CHARLES EHLER & FANNY DOUVÈRE, *Marine Spatial Planning: A Step-by-Step Approach Toward Ecosystem-Based Management* 18 (2009).

<sup>86</sup> *Id.* at 19.

<sup>87</sup> *Id.* at 18.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 19.

<sup>90</sup> *MSP Around the Globe*, MARINE SPATIAL PLANNING PROGRAMME, <http://msp.ioc-unesco.org/world-applications/overview/> [<https://perma.cc/54WW-YPJZ>]. For a full list



### III. European Law

Europe has a large offshore energy market, which includes both offshore wind and offshore drilling. The European Union has 550 offshore drilling operations<sup>91</sup> and 105 offshore wind farms in European waters.<sup>92</sup> According to the IEA, the North Sea, which has more than 300 oil and gas fields, “is at the forefront of debates about the changing nature of offshore energy and the potential synergies between different activities.”<sup>93</sup> While IEA projections indicate a shift towards investment in offshore wind, it suggests that investment remains strong in the development of offshore oil and gas in the region.<sup>94</sup> The IEA notes that there are strong incentives for governments to collaborate and for other partners to manage the energy transition underway in the North Sea.<sup>95</sup> Ten European countries have committed to deploy offshore wind and promote regional interconnections, which has encouraged industry players to work together to develop offshore capacity and interconnections.<sup>96</sup>

Europe is one of the largest offshore wind energy producers in the world, and its offshore wind capacity continues to grow as more offshore wind farms are proposed and developed. In 2017, “nearly 84% (15,780 MW<sup>97</sup>) of all offshore installations” in the world were located in the waters off the coast of eleven European countries.<sup>98</sup> In 2018, Europe connected 409 new offshore wind turbines, increasing its offshore energy capacity by 2,649 MW to 18,499 MW.<sup>99</sup> Europe’s 105 offshore wind farms are connected to the grid, representing eleven countries.<sup>100</sup> Of the capacity installed in 2018,

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of the status of marine spatial planning in countries with MSP initiatives, see *Status of MSP*, MARINE SPATIAL PLANNING PROGRAMME, [http://msp.ioc-unesco.org/world-applications/status\\_of\\_msp/](http://msp.ioc-unesco.org/world-applications/status_of_msp/) [<https://perma.cc/RE9N-UQ8E>].

<sup>91</sup> *Offshore Oil and Gas Safety*, *supra* note 37.

<sup>92</sup> WIND EUROPE BUS. INTELLIGENCE, *OFFSHORE WIND IN EUROPE: KEY TRENDS AND STATISTICS 2018* 8 (Colin Walsh & WindEurope eds., 2019).

<sup>93</sup> *OFFSHORE ENERGY OUTLOOK*, *supra* note 29, at 57.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> MW stands for Megawatts.

<sup>98</sup> *Offshore Wind Power*, GLOBAL WIND ENERGY COUNCIL, <https://gwec.net/global-figures/global-offshore/> [<https://perma.cc/5TT9-3LB8>].

<sup>99</sup> See WIND EUROPE BUS. INTELLIGENCE, *supra* note 92, at 7.

<sup>100</sup> *Id.* at 12. These 11 countries include the UK (39); Germany (25); Denmark (14); Belgium (7); Netherlands (6); Sweden (4); Finland (3); Spain (2); France (2); Ireland (1);

1,651 MW (62%) of installed capacity is located in the North Sea; 395 MW (15%) of installed capacity is in the Irish Sea; 387 MW (14%) is in the Baltic Sea; and the rest (9% or 229 MW) was installed in the Atlantic Ocean.<sup>101</sup>

*a. Energy and Environmental Goals in the Treaty on the Functioning of the EU*

Under Article 194 of the Treaty on the Functioning of the European Union (“TFEU”), the EU policy on energy is designed to ensure the functioning of the energy market, ensure secure energy supplies, promote energy efficiency, and promote the interconnection of energy networks.<sup>102</sup> The TFEU also mandates that environmental protection measures should be integrated into the definition and implementation of EU activities, particularly to promote sustainable development.<sup>103</sup> The TFEU specifically notes that EU policy should “preserv[e], protect[] and improv[e] the quality of the environment, protect[] human health, . . . and in particular combat[] climate change.”<sup>104</sup>

The EU has several directives which relate to balancing the goals outlined in the TFEU with offshore energy and renewable energy targets. Within the EU, directives are binding on the countries to which they are addressed, though Member States are left to decide the form and means of implementation.<sup>105</sup> The first relevant directive is the 2008 Directive “establishing a framework for community action in the field of marine environmental policy (Marine Strategy Framework Directive)[.]”<sup>106</sup> This Directive incorporates goals from previous EU directives designed for “the protection and conservation of the marine environment . . . with the

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and Norway (1). *Id.*

<sup>101</sup> *Id.* at 17. The UK has the majority of that installed capacity (49%), followed by Germany (36%) and Belgium (12%). *Id.* at 14.

<sup>102</sup> Consolidated Version of the Treaty on the Functioning of the European Union, 2016 O.J. (C 202) 1 [hereinafter TFEU].

<sup>103</sup> *Id.* art. 11.

<sup>104</sup> *Id.* art. 191.

<sup>105</sup> *Summary of Art. 288 TFEU*, EUR-LEX (last updated July 11, 2018), <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=LEGISSUM:l14527&from=EN> [https://perma.cc/4FCF-JAX9]; TFEU, *supra* note 102, art. 288.

<sup>106</sup> Directive 2008/56/EC of the European Parliament and of the Council of 17 July 2008 Establishing a Framework for Community Action in the Field of Marine Environmental Policy (Marine Strategy Framework Directive), 2008 O.J. (L 164/19).

overall aim of promoting sustainable use of the seas and conserving marine ecosystems[.]”<sup>107</sup> as well as from directives about marine protected areas.<sup>108</sup> The Marine Strategy Framework Directive specifically noted that:

[b]y applying an ecosystem-based approach to the management of human activities while enabling sustainable use of marine goods and services, priority should be given to achieving or maintaining good environmental status in the Community’s marine environment, to continuing its protection and preservation, and to preventing subsequent deterioration.<sup>109</sup>

The Marine Strategy Framework Directive goes on to describe the goal of the Directive to create “a transparent and coherent legislative framework,” which integrates environmental concerns into other policies, while recognizing that regions require different approaches.<sup>110</sup>

Subsequently, a 2014 Directive “establishing a framework for maritime spatial planning” (“2014 MSP Directive”) entered into force.<sup>111</sup> The 2014 MSP Directive referenced the goals set out by the 2008 Marine Strategy Framework Directive, including “maritime spatial planning as a cross-cutting policy tool enabling public authorities and stakeholders to apply a coordinated, integrated, and trans-boundary approach[.]”<sup>112</sup> The 2014 MSP Directive recognizes that “[t]he application of an ecosystem-based approach will contribute to promoting the sustainable development and growth of the maritime and coastal economies and the sustainable use of marine and coastal resources.”<sup>113</sup> While the 2014 MSP Directive acknowledges that the EU can “provide a framework for maritime spatial planning, Member States remain responsible and competent for designing and determining, within their marine

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<sup>107</sup> *Id.* ¶ 4.

<sup>108</sup> *Id.* ¶ 6.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> Directive 2014/89/EU of the European Parliament and of the Council of 23 July 2014 Establishing a Framework for Maritime Spatial Planning, 2014 O.J. (L 257) 135, 135.

<sup>112</sup> *Id.* at 135, ¶ 3.

<sup>113</sup> *Id.*

waters, the format and content of such plans[.]”<sup>114</sup> The deadline for transposition of the 2014 MSP Directive was 2016; the next deadline for EU countries to establish maritime spatial plans is 2021.<sup>115</sup> As part of the implementation of the 2014 MSP Directive, the EU has “launched a study on international best practices for cross-border MSP” in collaboration with IOC-UNESCO aimed at creating an inventory of MSP implementation in the world, exploring four case studies, and preparing recommendations for international cooperation on MSP.<sup>116</sup> Three workshops arising out of that joint effort occurred in 2018 and 2019.<sup>117</sup>

Beyond the MSP Directives, the EU has directives relating to Europe’s energy goals. The EU adopted the 2009 Renewable Energy Directive, which “establish[ed] an overall policy for the production and promotion of energy from renewable sources in the EU[.]” requiring that “the EU fulfil [sic] at least 20% of its total energy needs with renewables by 2020” through targets set by individual nations.<sup>118</sup> The revised renewable energy directive, which entered into force in December 2018, was “aimed at keeping the EU a global leader in renewables and, more broadly, helping the EU to meet its emissions reduction commitments under the Paris Agreement.”<sup>119</sup> The revised renewable energy directive “establishes a new binding renewable energy target for the EU for 2030 of at least 32%, with a clause for a possible upward[] revision by 2023.”<sup>120</sup> It further requires that EU countries draft a 10-year National Energy & Climate Plan (“NECP”) for 2021 to 2030, “outlining how they will meet the new 2030 targets for renewable energy and energy efficiency[.]” which must be submitted to the European Commission by the end of 2019.<sup>121</sup> Upon review of the 2018 draft NECPs submitted by various countries, the European

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<sup>114</sup> *Id.* at 136, ¶ 11.

<sup>115</sup> *Maritime Spatial Planning*, EUROPEAN COMM’N, [https://ec.europa.eu/maritimeaffairs/policy/maritime\\_spatial\\_planning\\_en](https://ec.europa.eu/maritimeaffairs/policy/maritime_spatial_planning_en) [<https://perma.cc/HP8B-T8R3>].

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Renewable Energy Directive*, EUROPEAN COMM’N, <https://ec.europa.eu/energy/en/topics/renewable-energy/renewable-energy-directive/overview> [<https://perma.cc/5M7X-ETHD>].

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

Commission released an assessment of the NECPs noting that, despite the “significant efforts” demonstrated, the plans “fall[] short both in terms of renewables and energy efficiency contributions;” therefore, “reaching the EU’s overall climate and energy goals will require a collective step up of ambition.”<sup>122</sup> Despite these challenges, the EU remains committed to achieving its renewable energy targets with participation from Member States and the public.<sup>123</sup>

*b. Shifts in EU Policies after the Deepwater Horizon Oil Spill*

The EU has responded to oil spills by passing legislation aimed at ensuring the safety of offshore oil rigs and gas drilling. Following the Deepwater Horizon oil spill in the Gulf of Mexico in 2010, the EU passed two measures to respond to concerns about the safety of offshore oil rigs. The first EU response was the Commission Decision of 19 January 2012 on setting up of the European Offshore Oil and Gas Authorities Group (“the Commission Decision”).<sup>124</sup> The European Offshore Oil and Gas Authorities Group (“EUOAG”) acts as “a forum for the exchange of information and expertise between National Authorities, Third Countries, Industrial Associations, the European Commission and other stakeholders on all issues relating to major accident prevention and response in offshore oil and gas operations.”<sup>125</sup> EUOAG prepares guidance documents, standards and best practices, coordinates the exchange of information about the application of national and EU policies, and assists in monitoring the implementation of EU legislation about offshore drilling.<sup>126</sup> EUOAG meets at least once per year and regularly reports on its activities, including its progress in identifying and implementing best practices.<sup>127</sup>

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<sup>122</sup> European Commission Press Release IP/19/2993, Energy Union: Commission Calls on Member States to Step Up Ambition in Plans to Implement Paris Agreement (June 18, 2019).

<sup>123</sup> *Id.*

<sup>124</sup> See generally Commission Decision of 19 January 2012 on Setting up of the European Union Offshore Oil and Gas Authorities Group, 2012 O.J. (C 18) 8 [hereinafter Commission Decision].

<sup>125</sup> *EU Offshore Authorities Group*, EUROPEAN COMM’N, (June 6, 2018), <https://euoag.jrc.ec.europa.eu/> [<https://perma.cc/6V29-K5KC>].

<sup>126</sup> *Id.*

<sup>127</sup> Commission Decision, *supra* note 124, art. 5.

The second EU response to the Deepwater Horizon oil spill was Directive 2013/30/EU on the safety of offshore oil and gas operations (“the Offshore Directive”) to counter concerns about the safety of offshore drilling rigs and the potential for offshore pollution.<sup>128</sup> The Offshore Directive recognized that the fragmented regulatory framework applying to offshore drilling within the EU did not adequately protect against those threats.<sup>129</sup> To resolve these deficiencies, it directed that offshore operators reduce the risk of a major accident as “reasonably practicable, to the point where the cost of further risk reduction would be grossly disproportionate to the benefits[.]”<sup>130</sup> and specifically ensured that the public would be able to participate in decision-making.<sup>131</sup> The Offshore Directive further directed that Member States incorporate best practices into their regulatory schemes to prevent major accidents, while limiting the consequences for human life and health as well as the environment.<sup>132</sup> Moreover, it directs Member States to prevent conflicts of interest between regulatory functions relating to safety and the environment, and those relating to the economics of offshore drilling.<sup>133</sup> Upon the passage of the Offshore Directive, Member States had time to integrate the goals of the directive into their national regulatory framework.<sup>134</sup> The Offshore Directive gave Member States until July 19, 2018 to apply the laws, regulations, and administrative provisions included within the Directive to existing oil and gas installations.<sup>135</sup>

In August 2018, the European Commission released a report on the safety of offshore oil and gas operations in the EU for 2016 (“Annual Report”) as part of its evaluation of the Directive.<sup>136</sup> In the Annual Report, Member States report information using a

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<sup>128</sup> See generally Directive 2013/30/EU of the European Parliament and of the Council of 12 June 2013 on the Safety of Offshore Oil and Gas Operations and Amending Directive 2004/35/EC, 2013 (L 178) 66 [hereinafter 2013 Directive].

<sup>129</sup> *Id.* at 67, ¶ 9.

<sup>130</sup> *Id.* at 67, ¶ 14.

<sup>131</sup> *Id.* art. 5.

<sup>132</sup> *Id.* art. 3.

<sup>133</sup> *Id.* at 68, ¶ 20.

<sup>134</sup> 2013 Directive, *supra* note 128, arts. 41–42.

<sup>135</sup> *Id.* art. 42.

<sup>136</sup> *Annual Report on the Safety of Offshore Oil and Gas Operations in the European Union for the Year 2016*, COM (2018) 595 final (Aug. 17, 2018) [hereinafter *Annual Report*].

common format to evaluate major hazard indicators including the number, type, location, and age of offshore oil and gas installations, and the number of offshore inspections, investigations, enforcement actions, and incidents on offshore rigs.<sup>137</sup> The Annual Report showed that two EU Member States had not yet completely integrated the Offshore Directive.<sup>138</sup> According to the Annual Report, only ten reportable enforcement actions or convictions were carried out by Member State authorities in 2016, though Member State authorities have regularly inspected offshore rigs in their jurisdiction under the Offshore Directive.<sup>139</sup> The Annual Report also indicates that only two Member States carried out investigations for serious incidents during 2016, though other less serious enforcement actions including improvement notices were taken by three Member States.<sup>140</sup> Unfortunately, the Annual Report was the first produced under the Offshore Directive and no comparisons could be made to preceding years to reveal trends. The Commission nonetheless concluded that the offshore oil and gas industry was operating within an adequate margin of safety.<sup>141</sup>

As of 2018, the transitional period for Member States to integrate the goals of the Directive into their laws has been completed and oil companies should have completed their implementation of the new safety rules.<sup>142</sup> Companies have been able to submit their feedback on the new rules and the EU is evaluating that feedback.<sup>143</sup> Publicly available feedback from five companies and business associations in the EU provides some insight into industry response to the Offshore Directive.<sup>144</sup> A

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<sup>137</sup> *Id.* § 3.

<sup>138</sup> *Id.* § 4.2. The Annual Report does not specifically name the two Member States that have not completely integrated the Offshore Directive. *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> *Annual Report*, *supra* note 136, § 6.

<sup>142</sup> Robert Hodgson, *Offshore Oil Facing Countdown to Comply with New EU Safety Rules*, EURACTIV (Mar. 30, 2018), <https://www.euractiv.com/section/energy/news/fri-offshore-oil-facing-countdown-to-comply-with-new-eu-safety-rules/> [<https://perma.cc/B6Q4-ZCL3>].

<sup>143</sup> *Evaluation of the Directive on Safety of Offshore Oil and Gas Operations*, EUROPEAN COMM'N (last updated Aug. 20, 2019), <https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2018-2361494> [<https://perma.cc/UL8L-JLYW>].

<sup>144</sup> *See Feedback Received on Evaluation of the Directive on Offshore Oil and Gas Operations*, EUROPEAN COMM'N (2018), [https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2018-2361494/feedback\\_en?p\\_id=228837](https://ec.europa.eu/info/law/better-regulation/initiatives/ares-2018-2361494/feedback_en?p_id=228837)

recurring theme in the feedback is concerns about liability and compensation for offshore accidents. As of August 2019, the final evaluation of the Offshore Directive has not yet been released, though the roadmap to implementation indicates that the evaluation is due in the third quarter of 2019.<sup>145</sup>

#### IV. United States Laws and Regulations

The IEA notes in its Offshore Energy Outlook report that the United States has a high potential for the development of offshore wind.<sup>146</sup> Relating to offshore oil and gas production, the Bureau of Ocean Energy Management (“BOEM”) forecasted that the Gulf of Mexico region will set a record high in oil production in 2018, a trend which it predicts will continue through 2024.<sup>147</sup>

##### *a. Federal Laws Regulating Offshore Oil and Gas Exploration*

Within the United States, all offshore energy is broadly governed by a complex set of statutes covering the continental shelf and coastal zone, as well as by environmental statutes and various agency regulations.<sup>148</sup> It is a complicated scheme that attempts to balance various state and federal interests, including navigation, energy, and environmental protection. The primary statute is the Outer Continental Shelf Lands Act (“OCSLA”),<sup>149</sup> which grants the Secretary of the Interior the authority to administer mineral exploration and development on the outer continental shelf.<sup>150</sup> Additional statutes, including the Oil Pollution Act of 1990,<sup>151</sup> the

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[<https://perma.cc/U36N-HNBR>].

<sup>145</sup> *Id.*

<sup>146</sup> OFFSHORE ENERGY OUTLOOK, *supra* note 29.

<sup>147</sup> BLAKE A. ZERINGUE ET AL., U.S. BUREAU OF OCEAN ENERGY MGMT., OCS REPORT BOEM 2017-082, OIL AND GAS PRODUCTION FORECAST: 2018-2027 (Dec. 2017), <https://www.boem.gov/BOEM-2017-082/> [<https://perma.cc/G9YL-FAY7>].

<sup>148</sup> See generally U.S. BUREAU OF OCEAN ENERGY MGMT., *Federal Offshore Lands*, <https://www.boem.gov/Federal-Offshore-Lands/> [<https://perma.cc/25N3-RC4W>]; see also JONATHAN L. RAMSEUR, CONG. RESEARCH SERV., RL33705, OIL SPILLS: BACKGROUND AND GOVERNANCE (2017) [hereinafter RAMSEUR].

<sup>149</sup> See generally Outer Continental Shelf Lands Act, 43 U.S.C. §§ 1331–1356(b) (2017).

<sup>150</sup> *Id.* § 1333.

<sup>151</sup> 33 U.S.C. §§ 2701–2720 (2017).



Clean Water Act,<sup>152</sup> the Clean Air Act,<sup>153</sup> the Coastal Zone Management Act,<sup>154</sup> and various statutes regarding pipelines, cover other aspects of oil drilling, extraction, and transportation.<sup>155</sup> The Oil Pollution Act of 1990 (“OPA”) “amended the Clean Water Act and addressed the wide range of problems associated with preventing, responding to, and paying for oil pollution incidents in navigable waters of the United States.”<sup>156</sup> OPA was enacted after the Exxon-Valdez oil spill in 1989 and “made comprehensive changes to U.S. oil pollution law by expanding federal response authority and increasing spill liability.”<sup>157</sup>

The Coastal Zone Management Act of 1972<sup>158</sup> (“CZMA”) was “designed to preserve, protect, develop, and where possible, to restore or enhance, the resources of the nation’s coastal zone for this and succeeding generations[.]”<sup>159</sup> and “to encourage and assist the states to exercise effectively their responsibilities in the coastal zone through the development and implementation of management programs to achieve wise use of the land and water resources of the coastal zone[.]”<sup>160</sup> CZMA requires that any federal actions and federally submitted projects, even those within exclusively federal waters, must be submitted for state review to ensure compliance with that state’s programs for managing its coastal zones.<sup>161</sup> The National Oceanic and Atmospheric Administration (“NOAA”) is responsible for administering CZMA.<sup>162</sup> The specific programs created by CZMA and overseen by NOAA work to address different concerns of coastal zone management: (1) balancing competing

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<sup>152</sup> 33 U.S.C. §§ 1251–1275 (2017).

<sup>153</sup> 42 U.S.C. §§ 7401–7431 (2017).

<sup>154</sup> 16 U.S.C. §§ 1452–1466 (2017).

<sup>155</sup> See generally RAMSEUR, *supra* note 148.

<sup>156</sup> *Oil Pollution Act of 1990 (OPA)*, U.S. COAST GUARD, [https://www.uscg.mil/Mariners/National-Pollution-Funds-Center/About\\_NPFC/opa/](https://www.uscg.mil/Mariners/National-Pollution-Funds-Center/About_NPFC/opa/) [<https://perma.cc/Q2C7-7M43>].

<sup>157</sup> RAMSEUR, *supra* note 148, at 4.

<sup>158</sup> Coastal Zone Management Act, 16 U.S.C. §§ 1451–1466 (2017).

<sup>159</sup> *Id.* § 1452(1).

<sup>160</sup> *Id.* § 1452(2).

<sup>161</sup> ADAM VANN, CONG. RESEARCH SERV., RL33404, OFFSHORE OIL AND GAS DEVELOPMENT: LEGAL FRAMEWORK 13 (2018) [hereinafter VANN].

<sup>162</sup> *Coastal Zone Management Act*, OFFICE FOR COASTAL MGMT., <https://coast.noaa.gov/czm/act/> [<https://perma.cc/5FYL-VFZM>] [hereinafter *Coastal Zone Management Act*].

issues; (2) providing research on the human impact of estuaries; and (3) protecting threatened coastal and estuarine lands through partnerships with state and local governments.<sup>163</sup>

Many other federal laws incorporate various concerns relating to the use of the ocean for human purposes, including oil extraction and navigation.<sup>164</sup> Some laws which may affect leasing and offshore energy activities include: the Rivers and Harbors Act (“RHA”),<sup>165</sup> the Marine Mammal Protection Act (“MMPA”),<sup>166</sup> and the Endangered Species Act (“ESA”).<sup>167</sup> The RHA generally prohibits obstructions to navigable waters.<sup>168</sup> The MMPA prohibits the “take” of marine mammals in U.S. waters and by U.S. citizens on the high seas.<sup>169</sup> Similarly, the ESA “prohibits any person subject to U.S. jurisdiction from ‘taking’ any endangered species within the territorial sea or on the high sea[,]” including through “significant habitat modifications that kill or injure listed species by altering their essential behavior patterns.”<sup>170</sup> The National Marine Sanctuaries Act (“NMSA”) may also affect the availability of offshore lands for leasing. NSMA “identif[ies] and designate[s] . . . areas of the marine environment which are of special national significance[,]” including areas that “possess conservation, recreational, ecological, historical, scientific, educational, cultural, archaeological, or [a]esthetic qualities which give them special national, and in some instances, international, significance.”<sup>171</sup> Additionally, the National Environmental Policy Act (“NEPA”) applies to any proposed major federal action and requires that all branches of government include a detailed statement about the environmental impact of the action, known as an Environmental Impact Analysis (EIS), among other environmental considerations,

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<sup>163</sup> *Id.*

<sup>164</sup> For more information about the legal regime controlling ocean jurisdictions, see generally U.S. COMM’N ON OCEAN POLICY, REVIEW OF U.S. OCEAN AND COASTAL LAW: THE EVOLUTION OF OCEAN GOVERNANCE OVER THREE DECADES (2004) [hereinafter REVIEW OF U.S. OCEAN AND COASTAL LAW].

<sup>165</sup> *Id.* at 108.

<sup>166</sup> *Id.* at 35.

<sup>167</sup> *Id.* at 38.

<sup>168</sup> *Id.* at 108.

<sup>169</sup> *Id.* at 35.

<sup>170</sup> REVIEW OF U.S. OCEAN AND COASTAL LAW, *supra* note 164, at 38.

<sup>171</sup> *Id.* at 121.

before moving forward with the proposed action.<sup>172</sup> EIS under NEPA would occur at various stages of offshore energy development, including during the lease sales, exploration, development, and production stages of the process.<sup>173</sup>

*b. State Laws Affecting Offshore Energy Development*

The CZMA specifically gives states the task of “directly implementing the national coastal management program through coastal programs developed at the state level[]” based on “[t]he premise . . . that state and local governments can most effectively manage human activities because historically they have had primary jurisdiction over land use of non-federal property.”<sup>174</sup> As a result of this requirement by CZMA, “99 percent of the nation’s marine and Great Lakes coasts are governed by state coastal management programs; thirty-four out of thirty-five coastal and Great Lakes states . . . have federally-approved coastal management programs.”<sup>175</sup> The result is that states are granted “the flexibility to adopt the management approach for the coastal zone most compatible with the state’s general process of land use regulation and management[,]” although the state programs are “subject to continuing review by NOAA to determine the extent to which the state is implementing and enforcing the program” and a state’s program may be suspended or withdrawn under certain circumstances.<sup>176</sup>

Through CZMA, the state-level laws that are part of “a state’s federally approved coastal management program[]”<sup>177</sup> may impact the ability of the President to push forward any offshore energy development through the grant of federal licenses and permits. “Federal agency activity within or outside the coastal zone that affects any land or water use or natural resource of the coastal zone” must be “consistent to the maximum extent practicable with the

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<sup>172</sup> National Environmental Policy Act of 1969, 42 U.S.C. § 4332 (2017).

<sup>173</sup> See generally VANN, *supra* note 161 (explaining the various stages of offshore energy development, along with the accompanying environmental impact).

<sup>174</sup> REVIEW OF U.S. OCEAN AND COASTAL LAW, *supra* note 164, at 20.

<sup>175</sup> *Id.* The only non-participating Coastal or Great Lakes state is Illinois. *Id.* The U.S. territories of Puerto Rico, the Northern Mariana Islands, the U.S. Virgin Islands, Guam, and the American Samoa also have federally-approved coastal management programs. *Id.*

<sup>176</sup> *Id.* at 21.

<sup>177</sup> *Id.* at 22.

enforceable policies of approved [s]tate management programs.”<sup>178</sup> Federal agency activities include “development projects carried out by a federal agency, federal license or permit activities, and federal financial assistance to state and local governments.”<sup>179</sup> An applicant for a federal lease under OCLSA “must certify to the relevant state coastal management program that any activities described . . . will be conducted in a manner consistent with the enforceable policies of the state’s program.”<sup>180</sup> Federal consistency is determined by the “reasonably foreseeable effects on the coastal zone” on a case-by-case basis.<sup>181</sup>

Beyond the CZMA regime, additional state laws and regulations may impact the possibility of offshore energy exploration and development, such as state environmental policy acts, which may require environmental impact analyses much like NEPA.<sup>182</sup> Considering the broad, bipartisan opposition to offshore drilling by coastal states,<sup>183</sup> state regulations offer an opportunity for coastal states to make determinations regarding exploration, development, and management of adjacent coastal waters. Within the state’s territorial waters,<sup>184</sup> that “state has sole jurisdiction to issue leases and permits for oil and gas extraction, but the [lease] applicant has to meet the requirements of the state’s coastal zone management program,” and additional requirements by other federal and state agencies under other legal authorities.<sup>185</sup>

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<sup>178</sup> 16 U.S.C. § 1456(c)(1)(A) (2017).

<sup>179</sup> REVIEW OF U.S. OCEAN AND COASTAL LAW, *supra* note 164, at 21–22.

<sup>180</sup> *Id.* at 24.

<sup>181</sup> *Id.* at 21.

<sup>182</sup> See generally *States and Local Jurisdictions with NEPA-like Environmental Planning Requirements*, COUNCIL ON ENVTL. QUALITY <https://ceq.doe.gov/laws-regulations/states.html> [<https://perma.cc/843L-AJVJ>] (listing jurisdictions which have additional environmental review requirements under state or local law).

<sup>183</sup> See Jones, *supra* note 18.

<sup>184</sup> Generally, a state’s jurisdiction extends three geographic miles from the state’s coast. VANN, *supra* note 161, at 2. United States’ seaward jurisdiction is established by the Submerged Lands Act. REVIEW OF U.S. OCEAN AND COASTAL LAW, *supra* note 164, at 13. The Submerged Lands Act of 1953 “gives states the authority to manage, develop, and lease the natural resources throughout the water column and on and under the seabed[.]” in the zone “extending 3 miles seaward from the baseline” established by that state. *Id.* The baseline is typically the mean high tide line. *Id.* at n. 57. The Gulf coast boundaries of Texas and Florida extend to the three-marine-league limit. *Id.*

<sup>185</sup> REVIEW OF U.S. OCEAN AND COASTAL LAW, *supra* note 164, at 3.

## V. Offshore Energy Developments Under the Obama and Trump Administrations

Since 2008, the United States has experienced a surge in offshore energy production in large part due to the increasing presence of offshore wind and oil along the Gulf and Atlantic coasts.<sup>186</sup> While the Obama and Trump Administrations have employed different approaches to the issue, the ongoing need for oil and gas and the projected growth in the United States' oil and gas exports in the future<sup>187</sup> suggest that these issues will continue even while President Trump's expansion of offshore drilling is delayed in courts. Furthermore, offshore wind is a growing industry in the United States<sup>188</sup> as more states move to increase their offshore wind capacity, raising concerns related to balancing competing interests.

### a. Obama Administration (2009 - 2017)

President Obama attempted to address the regulatory gaps in long-term planning for offshore energy development and management by directing an interagency task force to “develop[] recommendations to enhance our ability to maintain healthy, resilient, and sustainable ocean, coasts, and Great Lakes resources for the benefit of present and future generations.”<sup>189</sup> The Interagency Ocean Policy Task Force (“IOPTF”) “reviewed Federal, State, and foreign policies and models, past and pending legislation, the recommendations contained in the two earlier Ocean Commission’s reports, and public comments[,]” and “initiated a robust public engagement process to receive input from a diversity

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<sup>186</sup> See Terry Yen, *EIA's Annual Energy Outlook 2019 Projects Growing Oil, Natural Gas, Renewables Production*, U.S. ENERGY INFO. ADMIN. (Jan. 24, 2019), <https://www.eia.gov/todayinenergy/detail.php?id=38112> [<https://perma.cc/D56E-6ZYE>].

<sup>187</sup> See *id.*; see also Terry Yen, *The United States is Expected to Export More Energy Than It Imports by 2020*, U.S. ENERGY INFO. ADMIN. (Jan. 29, 2019), <https://www.eia.gov/todayinenergy/detail.php?id=38152> [<https://perma.cc/GJ82-ABZN>].

<sup>188</sup> See, e.g., Eric Nüiler, *Offshore Wind Farms Are Spinning Up in the US – At Last*, WIRED (Apr. 17, 2019, 1:03 PM), <https://www.wired.com/story/offshore-wind-farms-are-spinning-up-in-the-us-at-last/> [<https://perma.cc/EX53-5TNA>] (describing the Vineyard Wind offshore wind project in Massachusetts and the growth of the offshore wind energy throughout the United States).

<sup>189</sup> COUNCIL ON ENVTL. QUALITY, FINAL RECOMMENDATIONS OF THE INTERAGENCY OCEAN POLICY TASK FORCE (2010), [https://www.nsf.gov/geo/opp/opp\\_advisory/briefings/nov2010/optf\\_finalrecs.pdf](https://www.nsf.gov/geo/opp/opp_advisory/briefings/nov2010/optf_finalrecs.pdf) [<https://perma.cc/R8K6-PKQW>] [hereinafter FINAL RECOMMENDATIONS OF THE IOPTF].

of voices across the country.”<sup>190</sup> Following this process and their analysis, the IOPTF recommended the creation of national priorities regarding ocean management, including conservation, resiliency, science-backed decision-making, and scientific research, creating a “comprehensive national approach to . . . ocean stewardship.”<sup>191</sup>

To implement this national ocean policy, the IOPTF recommended several steps, including creating a new National Ocean Council (“NOC”); formally engaging with state, tribal, and local authorities by creating a committee of their representatives; and strengthening the coordination between the NOC and other White House agencies that deal with national security, economics, and the environment.<sup>192</sup> IOPTF further recommended priority objectives to include ecosystem-based management, coastal and marine spatial planning, public education, and coordination between different levels of government.<sup>193</sup> Following the publication of IOPTF’s Final Recommendations, President Obama issued EO 13,547, titled “Stewardship of the Ocean, Our Coasts, and the Great Lakes,” in which he directed executive agencies to implement those recommendations under the guidance of a NOC.<sup>194</sup> In 2016, the NOC finalized ocean plans and released two regional plans to “promote the use of integrated ocean data and best practices for informed and efficient management of the Nation’s shared marine resources.”<sup>195</sup>

*b. Recent Federal Developments Evaluating Potential Environmental Impacts of Offshore Drilling*

Since the Trump Administration announced its decision in January 2018<sup>196</sup> to open up leasing to offshore oil and gas drilling, the federal government has begun the process of opening up these

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<sup>190</sup> *Id.* at 2.

<sup>191</sup> *Id.* at 3.

<sup>192</sup> *Id.* at 4.

<sup>193</sup> *Id.* at 3.

<sup>194</sup> Exec. Order No. 13,547, 75 Fed. Reg. 43,023 (Jul. 22, 2010). This Executive Order was revoked by Executive Order 13,840. Exec. Order No. 13,840, 83 Fed. Reg. 29,431, 29,433 (June 22, 2018).

<sup>195</sup> Christy Goldfuss & John P. Holdren, *The Nation’s First Ocean Plans*, THE WHITE HOUSE – PRESIDENT BARACK OBAMA (Dec. 7, 2016, 9:02 AM), <https://obamawhitehouse.archives.gov/blog/2016/12/07/nations-first-ocean-plans> [<https://perma.cc/NTF9-8ATR>].

<sup>196</sup> See Friedman, *supra* note 1.

federal leasing areas to offshore oil development. In August 2018, BOEM and the Bureau of Safety and Environmental Enforcement (“BSEE”) released a Draft Programmatic Environmental Assessment for Federally Regulated Offshore Oil and Gas Activities in the Southern California Planning Area (“PEA”) to “evaluate the potential environmental impacts of continued BSEE review and approval of permitted oil and gas activities on the [Pacific Outer Continental Shelf].”<sup>197</sup> In the PEA, BOEM and BSEE determine that the air quality impacts of the proposed action and alternatives would be minor or nonexistent.<sup>198</sup> Additionally, the PEA concludes that there are negligible impacts for the proposed action and alternatives in terms of “cumulative impacts on regional air quality or climate change[] when combined with other ongoing or possible future emissions.”<sup>199</sup> Finally, the PEA concludes that the effects on water quality would likewise be minor to nonexistent for the proposed action and alternatives, and that there would be no cumulative impacts on water quality.<sup>200</sup>

In June 2018, President Trump revoked the Obama Administration’s EO 13,547 through EO 13,840.<sup>201</sup> EO 13,840 shifted the direction of the ocean policy for the United States.<sup>202</sup> In EO 13,840, President Trump focused on the economic impact of ocean industries and the importance of federal waters in the United States’ security interests including defense and energy.<sup>203</sup> Although some of the policy recommendations of EO 13,840 echo those present in the IOPTF recommendations, there is a distinct shift towards encouraging economic development of marine environment and emphasizing the strategic use of United States waters. One such directive, similar to that in the IOPTF

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<sup>197</sup> ARGONNE NAT’L LAB., PROGRAMMATIC ENVIRONMENTAL ASSESSMENT FOR FEDERALLY REGULATED OFFSHORE OIL AND GAS ACTIVITIES IN THE SOUTHERN CALIFORNIA PLANNING AREA ES-1 (Aug. 2018).

<sup>198</sup> *Id.*

<sup>199</sup> *Id.* at 4-9.

<sup>200</sup> *Id.* at 3-5.

<sup>201</sup> *Id.*

<sup>202</sup> Maya Wei-Haas, *Trump Just Remade Ocean Policy – Here’s What That Means*, NAT’L GEOGRAPHIC (July 13, 2018), <https://www.nationalgeographic.com/environment/2018/07/news-ocean-policy-indigenous-sustainability-fisheries-industry-economy-marine> [https://perma.cc/4PHC-Y4WV].

<sup>203</sup> See Exec. Order 13,840, 83 Fed. Reg. 29,431 (June 22, 2018).

recommendations, is for the United States’ ocean policy to “modernize the acquisition, distribution, and use of the best available ocean-related science and knowledge, in partnership with marine industries; [s]tate, tribal, and local governments; and other ocean stakeholders, to inform decisions and enhance entrepreneurial opportunity . . . .”<sup>204</sup> Much like the EO 13,547 development of the NOC, EO 13,840 establishes an interagency Ocean Policy Committee (“OPC”) to “ensure appropriate coordination by Federal agencies on ocean-related matters.”<sup>205</sup> Another similarity between the two directives is in the regional ocean management plans encouraged by the IOPTF recommendations, although the two plans differ in this requirement due to the voluntary component of those regional plans.<sup>206</sup> EO 13,840 removed the regional planning bodies operating under EO 13,547, choosing instead to rely on “voluntarily formed Regional Ocean Partnerships.”<sup>207</sup> EO 13,840 enables the OPC to “engage and collaborate, under existing laws and regulations, with stakeholders, including regional ocean partnerships, to address ocean-related matters that may require interagency or intergovernmental solutions[.]”<sup>208</sup> It also grants the OPC the right to “obtain information and advice concerning ocean-related matters from[] State, tribal, and local governments; and private-sector entities and individuals.”<sup>209</sup>

On June 28, 2018, the Executive Office of the President released a memorandum from the Council on Environmental Quality (“CEQ”) and the Office of Science and Technology Policy (“OSTP”) as guidance for executives to implement EO 13,840.<sup>210</sup>

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<sup>204</sup> *Id.* § 2.

<sup>205</sup> *Id.* § 4.

<sup>206</sup> See generally *id.*, §§ 3, 5 (Trump’s Exec. Order relies on voluntarily formed partnerships); Exec. Order No. 13,547, 75 Fed. Reg. 43,023 (Obama’s Exec. Order requiring participation, repealed by Trump’s Exec. Order No. 13840) (July 22, 2010).

<sup>207</sup> *Fact Sheet: President Donald J. Trump is Promoting America’s Ocean Economy*, THE WHITE HOUSE (June 19, 2018), <https://www.whitehouse.gov/briefings-statements/president-donald-j-trump-promoting-americas-ocean-economy/> [<https://perma.cc/T2UG-GUXD>].

<sup>208</sup> Exec. Order No. 13,840, 83 Fed. Reg. 29,431, § 5 (June 22, 2018).

<sup>209</sup> *Id.*

<sup>210</sup> EXEC. OFFICE OF THE PRESIDENT, GUIDANCE FOR IMPLEMENTING EXECUTIVE ORDER 13840, TITLED “OCEAN POLICY TO ADVANCE THE ECONOMIC, SECURITY, AND ENVIRONMENTAL INTERESTS OF THE UNITED STATES,” <https://www.whitehouse.gov/wp-content/uploads/2017/11/20180628EO13840OceanPolicyGuidance.pdf>



The guidance document instructs agencies to submit points of contact for the OPC by July 5, 2018; to complete internal reviews of existing regulations, guidance, and policies to ensure compliance with the EO by September 17, 2018; and to continue collaboration with regional ocean partnerships.<sup>211</sup> A meeting summary of the OPC's August 1, 2018 meeting further elaborates on implementation actions taken by the Committee.<sup>212</sup> The OPC established subcommittees on Ocean Resource Management ("ORM") and Ocean Science and Technology ("OST"),<sup>213</sup> similar to the subcommittees previously housed under the NOC.<sup>214</sup> The OPC directed the science subcommittee, the OST, to:

[A]ddress research and technology issues across agencies, . . . includ[ing] identifying priority ocean research and technology needs, participating as appropriate in the work of the National Oceanographic Partnership Program (NOPP), and supporting research and technology collaboration among the agencies and departments represented on the OPC.<sup>215</sup>

The OPC tasked the ORM with "address[ing] regulatory and policy coordination associated with ocean management, including through engagement with regional ocean partnerships (ROPs) and stakeholders[.]" and "coordinat[ing] the timely public release of unclassified ocean-related data and other information."<sup>216</sup>

The guidance document for implementation of EO 13,840 and the meeting summary both indicate the Trump Administration's embrace of regional ocean partnerships even as it rejects the mandate that federal agencies follow regional policies.<sup>217</sup> These

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[<https://perma.cc/BGU7-8DHD>] [hereinafter GUIDANCE].

<sup>211</sup> *Id.*

<sup>212</sup> OCEAN POLICY COMMITTEE MEETING SUMMARY, THE WHITE HOUSE (Aug. 1, 2018), <https://www.whitehouse.gov/wp-content/uploads/2017/11/OPC-Summary-Initial-Meeting-080118.pdf> [<https://perma.cc/7B48-T5HD>] [hereinafter OPC MEETING SUMMARY].

<sup>213</sup> *Id.*

<sup>214</sup> *See* Exec. Order No. 13,547, 75 Fed. Reg. 43,023, § 4 (July 22, 2010).

<sup>215</sup> *Id.*

<sup>216</sup> OPC MEETING SUMMARY, *supra* note 212.

<sup>217</sup> *See generally* GUIDANCE, *supra* note 210 (discussing implementation for Exec. Order No. 13,840); OPC MEETING SUMMARY, *supra* note 212 (summarizing the actions that at the Ocean Policy Committee's August 1, 2018 meeting).

regional partnerships existed before both President Obama's EO 13,547 and President Trump's EO 13,840. Regional ocean partnerships developed along the East Coast to encourage collaboration between coastal states. For example, in New England, the Northeast Regional Ocean Council ("NROC"), formed in 2005, "is a state and federal partnership that facilitates the New England states, federal agencies, regional organizations, and other interested regional groups in addressing ocean and coastal issues that benefit from a regional response."<sup>218</sup> NROC was formed by the governors of Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, and Connecticut.<sup>219</sup> The Mid-Atlantic Regional Council on the Ocean ("MARCO"), formed in 2009, functions in much the same way as NROC.<sup>220</sup> MARCO was formed by the governors of New York, New Jersey, Delaware, Maryland, and Virginia.<sup>221</sup>

Besides NROC and MARCO, the South Atlantic states of Florida, Georgia, North Carolina, and South Carolina were previously involved in the "Governor's South Atlantic Alliance," which was created in 2009 "to further the collaboration of the four Member States . . . and their partners on shared ocean and coastal challenges and opportunities while promoting environmental sustainability, disaster preparedness, and strong economies."<sup>222</sup> The Governor's South Atlantic Alliance ceased operating in 2016.<sup>223</sup> Although, at that time "members [were] evaluating existing regional collaboration opportunities and the potential for restructuring the organization based upon lessons learned, to maintain and build upon the partnerships and successes achieved by the Alliance over the past five years[.]"<sup>224</sup> no such successor organization has emerged in the South Atlantic.

In the time since President Trump issued EO 13,840, the two remaining regional ocean partnerships, NROC and MARCO, have

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<sup>218</sup> *About, NE. REG'L OCEAN COUNCIL*, <https://www.northeastoceancouncil.org/about/> [https://perma.cc/WKQ5-6S9R].

<sup>219</sup> *Id.*

<sup>220</sup> *See MARCO Overview, MID-ATL. REG'L COUNCIL ON THE OCEAN*, <http://midatlanticocean.org/about/marco-overview/> [https://perma.cc/UH8N-SNTF].

<sup>221</sup> *Id.*

<sup>222</sup> *Message from GSAA Leadership, GOVERNORS' S. ATL. ALL.* (Apr. 4, 2016), <https://southatlanticalliance.org/message-from-gsaa-leadership/> [https://perma.cc/9GWA-2K9E].

<sup>223</sup> *See id.*

<sup>224</sup> *Id.*

continued their efforts to engage in collaboration regardless of changes to federal agency engagement. MARCO released a statement on June 27, 2018, stating that “MARCO is ready and willing to keep moving ahead as the Mid-Atlantic’s State-led Regional Ocean Partnership to coordinate and collaborate on issues of shared regional concern.”<sup>225</sup> On December 20, 2018, MARCO sent a letter to NOAA and BOEM expressing its opposition to the proposed 2019-2024 National OCS Program and seismic testing associated with oil and gas exploration or development along their waters.<sup>226</sup> MARCO also hosted an ocean planning forum on March 20, 2019, discussing ocean planning and management issues which affect its work.<sup>227</sup> On December 6, 2018, the NROC sent a letter to the Co-Chairs and the Executive Director of the OPC requesting that the OPC “collaborate with NROC and mobilize federal agency capacity to advance . . . regional ocean management priorities, which have been identified and reaffirmed through extensive engagement with stakeholders.”<sup>228</sup> Subsequently, the NROC re-established their own Ocean Planning Committee (“NROC-OPC”) to “support and coordinate activities related to ocean planning in New England.”<sup>229</sup> The NROC has noted “four strategies for working towards its goal to support and coordinate ocean planning[,]” including: (1) providing a regional forum for offshore

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<sup>225</sup> *MARCO to Provide Forum for Regional Coordination on Ocean Management*, MID-ATL. REG’L COUNCIL ON THE OCEAN (June 27, 2018), <https://midatlanticocean.org/marco-to-provide-forum-for-regional-coordination-and-collaboration-on-ocean-management/> [https://perma.cc/2APB-RVPE].

<sup>226</sup> See Letter from Elizabeth Semple, MARCO Mgmt Bd. Chair, to Donna Wieting, Dir. Fisheries Office of Protected Res., NOAA & Kelly Hammerle, Nat’l Program Manager, U.S. Bureau of Ocean Energy Mgmt. (Dec. 20, 2018), <https://midatlanticocean.org/marco-delivers-letter-opposing-seismic-testing-permits/> [https://perma.cc/KDU2-7XTU].

<sup>227</sup> *Mid-Atlantic Ocean Forum 2019: Advancing Intergovernmental Collaboration and Ocean Planning*, MID-ATL. REG’L COUNCIL ON THE OCEAN, <https://midatlanticocean.org/mid-atlantic-ocean-forum-advancing-intergovernmental-collaboration-ocean-planning/> [https://perma.cc/D5JC-HKCW].

<sup>228</sup> Letter from Steve Couture, Adm’r, Coastal Program of N.H. Dep’t of Envr. Servs., to Ocean Policy Comm. Co-Chairs (Dec. 6, 2018), <https://neoceanplanning.org/wp-content/uploads/2018/12/NROC-Letter-to-CEQ-OSTP-12-6-18.pdf> [https://perma.cc/J9C3-GWJ8].

<sup>229</sup> *NROC Ocean Planning Committee – Draft 2019-2020 Work Plan*, NE. REG’L OCEAN COUNCIL, [https://neoceanplanning.org/wp-content/uploads/2019/06/NROC\\_OPC\\_WorkPlan\\_20192020.pdf](https://neoceanplanning.org/wp-content/uploads/2019/06/NROC_OPC_WorkPlan_20192020.pdf) [https://perma.cc/4BVW-B2D3].

planning and management; (2) developing data products characterizing human activities, natural and cultural resources; (3) enhancing existing regulatory and management processes using best available information, cross-jurisdiction coordination, pre-application consultations, and public engagement; and (4) determining the long-term capacity and funding needs to support the NROC's activities and regional coordination.<sup>230</sup> Since releasing these plans, NROC hosted an NROC-OPC meeting in June 2019 where the issues discussed included offshore wind, federal regulatory changes, federal environmental review for offshore wind, and the co-existence of sustainable fisheries and offshore wind.<sup>231</sup>

In February 2019, both the OST and ORM subcommittees under the OPC released their initial work plans to continue implementation of EO 13,840.<sup>232</sup> The OST Workplan explains that, although other entities and reports have already been created which “address priority ocean-related research and technology needs relevant to or developed by government, industry, and academia[.]”<sup>233</sup> the goals of OST's research are different:

OST action is not intended to replicate these efforts. Rather, it will identify research priorities that reflect interagency recommendations, present near-term opportunities, and support Administration policies. The OST will prioritize ocean-related research and technology needs across the OPC agencies guided by and consistent with existing policy and specific direction established by EO 13,840.<sup>234</sup>

That is to say, the OST's research is meant to support the Trump

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<sup>230</sup> *See id.*

<sup>231</sup> *See generally* *Presentations from the June 4 NROC Ocean Planning Committee Meeting*, NE. OCEAN PLANNING COUNCIL, <https://neocceanplanning.org/news/presentations-from-the-june-4-nroc-ocean-planning-committee-meeting/> [<https://perma.cc/Q6CK-9V22>] (providing slideshow presentations from NROC Ocean Planning Committee Meeting for Offshore Wind in the Northeast).

<sup>232</sup> *Initiatives*, COUNCIL ON ENVTL. QUALITY, <https://www.whitehouse.gov/ceq/initiatives/> [<https://perma.cc/B5ZL-CCJ6>] [hereinafter *Initiatives*].

<sup>233</sup> OCEAN POLICY COMM. OCEAN RES. MGMT. SUBCOMM., WORKPLAN TO IDENTIFY AND PUBLISH FEDERAL GEOSPATIAL DATA 1 (2019) [hereinafter OPC-ORM, WORKPLAN].

<sup>234</sup> *Id.*

Administration's goal of increasing offshore drilling. The first phase of OST's Workplan was to identify priority research and technology needs by March 2019; the second phase was meant to identify and prioritize projects supporting agency research and technology needs by May 2019; the third and final phase was to develop recommendations for implementation by July 2019.<sup>235</sup> The ORM's Workplan, in contrast, states that ORM "will address regulatory and policy coordination associated with ocean management, including through engagement with regional ocean partnerships and stakeholders."<sup>236</sup> This "include[s] addressing data and information needs and other ocean-related matters that may require interagency or intergovernmental coordination."<sup>237</sup> To accomplish this goal, the ORM will first "develop and implement a plan to identify and publish Federal geospatial data that addresses regionally identified data needs."<sup>238</sup> This first phase of ORM's Workplan, completed in November 2018, was to identify regional data needs;<sup>239</sup> the next phase was to identify and review agency data availability by March 2019;<sup>240</sup> and the third and final phase was to develop and implement the data plan.<sup>241</sup> The data plan was supposed to be completed by July 2019 with implementation from October 2019 forward.<sup>242</sup> As of September 2019, no plan had been released and the status of implementation was unclear.<sup>243</sup>

Since the initial workplans released in February 2019, the OPC has released a summary of its June 12, 2019 meeting including updates of both the ORM and the OST subcommittees.<sup>244</sup> According to the meeting summary, the ORM, in conjunction with both federal and non-federal stakeholders, has "identified regional data needs and explored opportunities to streamline the release of

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<sup>235</sup> *Id.*

<sup>236</sup> *Id.*

<sup>237</sup> *Id.*

<sup>238</sup> *Id.*

<sup>239</sup> OPC-ORM, WORKPLAN, *supra* note 233.

<sup>240</sup> *Id.* at 2.

<sup>241</sup> *Id.*

<sup>242</sup> *Id.*

<sup>243</sup> *See Initiatives*, *supra* note 232.

<sup>244</sup> OCEAN POLICY COMM. MEETING SUMMARY, THE WHITE HOUSE (June 12, 2019), <https://www.whitehouse.gov/wp-content/uploads/2017/11/20190626FINAL-OPC-June-12-Meeting-Summary-CLEAN.pdf> [<https://perma.cc/HPP6-6WBB>] [hereinafter OPC MEETING SUMMARY].

Federal data” and “is working to compile the draft data report to provide to the OPC in July 2019.”<sup>245</sup> Meanwhile, the OST subcommittee has identified “three main themes” to the ocean science and technology research needs of OPC agencies, including: (1) forecasting the physical and biological coastal environment; (2) exploring the unknown ocean; and (3) inspiring next-generation ocean technology.<sup>246</sup> According to the meeting summary, the compilation of the projects and recommendations should have been provided to the OPC in July 2019.<sup>247</sup>

As part of the Trump Administration’s efforts to encourage offshore oil and gas development and exploration, the Administration is attempting to remove the regulations adopted after the Deepwater Horizon oil spill under the Obama Administration related to safety measures on offshore oil rigs.<sup>248</sup> The House Energy and Commerce Committee has requested an investigation of this attempt to roll back safety measures through the Government Accountability Office, claiming that the rollback of those safety regulations “may increase the risk of another catastrophic spill.”<sup>249</sup> Environmental groups sued, claiming that “the Trump [A]dministration did not provide adequate justification for scaling back rules that were previously found to improve the

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<sup>245</sup> *Id.* As of October 1, 2019, the draft data report is not available on the White House Initiatives website. *Initiatives*, *supra* note 232.

<sup>246</sup> OPC MEETING SUMMARY, *supra* note 244. As of October 1, 2019, the draft data report is not available on the White House Initiatives website. *Initiatives*, *supra* note 232.

<sup>247</sup> *Id.*

<sup>248</sup> See Associated Press, *Trump Eases Regulations Adopted After BP Deepwater Horizon Disaster*, THE GUARDIAN (May 2, 2019), <https://www.theguardian.com/environment/2019/may/02/trump-eases-regulations-adopted-after-bp-deepwater-horizon-disaster> [<https://perma.cc/6MDA-8NJU>]; see also Lisa Friedman & Hiroko Tabuchi, *U.S. to Roll Back Safety Rules Created After Deepwater Horizon Spill*, N.Y. TIMES (Dec. 28, 2017), <https://www.nytimes.com/2017/12/28/us/trump-offshore-drilling.html> [<https://perma.cc/4YRV-EW84>] (describing the initial proposal by BSEE to reverse Obama-era regulations as part of the Trump Administration’s efforts to ease restrictions on oil and gas companies). The proposed rule can be found at: Oil and Gas and Sulfur Operations in the Outer Continental Shelf — Blowout Preventer Systems and Well Control Revisions, Proposed Rule, 83 Fed. Reg. 22,128 (May 11, 2018) (to be codified at 30 C.F.R. at pt. 250).

<sup>249</sup> Rebecca Beitsch, *House Democrats Push Investigation of Trump Rollback of Offshore Drilling Regs*, THE HILL (Aug. 5, 2019), <https://thehill.com/policy/energy-environment/456233-house-dems-push-investigation-of-trump-rollback-of-offshore> [<https://perma.cc/58H5-VZ3W>].

safety of offshore drilling for both rig workers and the environment.”<sup>250</sup>

## VI. Recommendations

While it is difficult to make direct comparisons between the regulatory regimes of the United States and Europe, it is clear that the regulatory gaps at the international level have the potential to leave significant differences between countries. Internationally, jurisdiction over coastal waters is left to Coastal States bordering those waters.<sup>251</sup> To the extent that the international regime encourages the sustainable management of coastal waters, efforts to encourage sustainable development and management are non-binding in nature, and encompassing UN resolutions about sustainable ocean management are still ongoing. Further non-binding efforts by UNESCO, to encourage marine spatial planning as a method of accomplishing the 2030 Agenda for sustainable development, give Member States a recommended system to develop and implement their own MSP initiatives.

Regionally, the OSPAR Convention, while lacking enforcement mechanisms, offers a collaborative system which focuses on evaluating various measures of success and incorporates a scheme wherein marine spatial planning is an essential ingredient of a regional system to managing the shared ocean waters. Evaluating best practices alongside specific metrics of ocean health, while incorporating the future-looking marine spatial planning regime, provides a mechanism for States and interested stakeholders to frequently evaluate the progress towards shared management goals. Through the regional-based OSPAR Convention, Europe has achieved success with reducing the discharge of pollutants from offshore drilling rigs and has begun the process of creating a more ecosystem-based approach to evaluate the impacts on specific goals of the OSPAR Convention. Europe’s willingness to collaborate with neighboring countries and its broader geographic region, while holding itself accountable to a board outside of the EU, is a

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<sup>250</sup> *Id.*; see also Valerie Volcovici, *Green Groups Sue Trump Administration for Gutting Offshore Oil Safety Rules*, REUTERS (June 11, 2019), <https://www.reuters.com/article/us-usa-oil-safety-lawsuit/green-groups-sue-trump-administration-for-gutting-offshore-oil-safety-rules-idUSKCN1TC20C> [<https://perma.cc/M6SV-P3VG>] (describing the lawsuit challenging the rollback of offshore drilling regulations filed by Earthjustice and other environmental groups).

<sup>251</sup> UNCLOS, *supra* note 44, art. 55.

framework which the United States should adopt.

The strengths of the European Union system are largely focused on the collaborative nature of European law and the focus on delineating specific goals in sustainable management, development, and environmental goals. This collaborative regulatory system, wherein Member States incorporate EU directives into the internal regulatory scheme of their States and periodically evaluate progress towards definite goals throughout the implementation process, grants the public and stakeholders the opportunity to participate throughout both implementation and evaluation of the directives.<sup>252</sup> This highly participatory system between Member States, analogous to coastal states within the United States, is similar to the federal-state divide in the United States in some ocean policies, notably the CZMA.

Despite the slow process of implementing the 2013 Directive, the ongoing efforts of yearly management and evaluation of best practices through the EUOAG indicate Europe's willingness to preemptively respond and adapt to environmental and safety concerns as they arise, rather than relying on the engagement of ordinary citizens or litigation-focused regulation. Member States and companies benefit from ongoing collaborative efforts between interested parties. Although the long-term environmental impacts of the 2013 Directive are yet to be evaluated, the regulatory structure within the EU offers distinct benefits in terms of industry participation and citizens' access to information. Those same values of industry collaboration and access to information are embraced by the OPC under the current Administration, though the actual progress towards public participation in these goals is not clearly evident through the White House's website cataloging the Trump Administration's environmental initiatives.<sup>253</sup>

An additional benefit to the European method, particularly employed under the OSPAR Convention, is the consideration of specific areas of improvement and the evaluation of those criteria in relation to each other. The United States' method of evaluating each proposed action and its potential environmental impacts does not consider the ecosystem as a whole or the long-term goals for development. Nor does the United States' current ocean policy

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<sup>252</sup> For more information on the European Union's Directives, *see generally* TFEU, *supra* note 102.

<sup>253</sup> *See Initiatives*, *supra* note 232.



indicate an emphasis on evaluating proposals in relation to marine spatial planning, which in turn would integrate long-term goals for ocean use, the environment, and energy.

The previous ocean policy, exemplified in the IOPTF recommendations endorsed by the Obama Administration in EO 13,547, encouraged exactly this kind of ecosystem-based management to create a comprehensive program to address concerns such as conservation and economic activity, while coordinating science-based management across multiple levels of government. Balancing the different uses of the ocean in relation to long-term goals was a primary focus of the IOPTF-endorsed system.<sup>254</sup> Similarly, the OSPAR method of ecosystem-based management embraced in Europe supports the wisdom of integrating not just energy production goals, but broader environmental concerns into marine development. The Trump Administration's framework has seemingly not embraced this methodology, focusing instead on the development of offshore energy as a driving force for ocean policy, rather than integrating environmental or ecosystem-management concerns into a defined ocean policy.

Furthermore, both the EU and the OSPAR Convention encourage a regional approach to ocean management, recognizing the value in managing ocean ecosystems in relation to the geographic characteristics of the area. Under the current United States ocean policy, regional collaboration is encouraged but not required.<sup>255</sup> The previous ocean policy mandated regional collaboration, granting regional organizations more power to collaborate with each other and with the federal government in the management of coastal waters. While these are similar, the voluntary nature of regional ocean partnerships under the current ocean policy does not clearly emphasize collaborative efforts between states with shared ocean ecosystems. Coastal states may share similar opinions on the ideal uses for their coastal waters, but they act individually in their opposition, rather than recognizing the shared nature of the ocean waters that cross their borders. The remaining regional ocean partnerships maintain their efforts to manage their oceans and provide data to their members, but their long-term success is still not assured by a strong federal policy that

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<sup>254</sup> *Id.*

<sup>255</sup> See Exec. Order No. 13,840, 83 Fed. Reg. 29,431, 29,433 (June 22, 2018).

recognizes their efforts as a necessary part of ocean management.

The regulatory framework for ocean management within the United States already requires the federal government to consult with the affected coastal state under the CZMA, enabling coastal states to have a say in the management of the oceans affecting their coast. Although the regulatory framework concerning offshore energy development is complex and difficult to manage, executive orders issued under both Presidents Obama and Trump explicitly acknowledge the value of federal and regional collaboration in ocean management. Even though the Trump Administration shifted the nation's ocean policy to be more focused on economic development, some of the structures created in the Obama Administration's EO 13,547 are retained in a slightly different form within the Trump Administration's framework. Notably, the Trump Administration's EO 13,840 encourages the same kind of regional collaboration that the IOPTF recommended and that already existed before the issuance of either EO. These regional partnerships could enable regions of the United States to implement some of the ocean management tools embraced by Europe and the IOPTF recommendations through their regional partnership organizations such as NROC and MARCO.

Within the established regional partnership framework embraced by the current Administration, the creation of regional goals for ocean management could provide a framework in which to ensure consistency across states. States could follow the European model of directives, where the primary goals are shared by all states within the region, with implementation left to those states within a set amount of time and with periods for evaluation and feedback from a separate committee of regional members. Although the EU directives are still undergoing a process of their own, the model of an implementation period followed by feedback could be useful as the United States' ocean policy transitions under the current Administration. In particular, the ability of the overseeing committee, EUOAG, to issue guidance and evaluate best practices would translate well to the role of the OPC. However, the lack of data available from the efforts of the OPC subcommittees limits the abilities of states, regional ocean partnerships, stakeholders, and the public to participate in the development of guidance and best practices.

The absence of the structure of a marine spatial plan to reinforce the long-term goals of ocean use, particularly in relation to ocean

use conflicts and environmental concerns, undermines the ability of any interested parties to evaluate proposals in relation to specific long-term goals. Instead, the current system still seems largely project-focused, limited to the policy goals expressed by the Trump Administration, rather than responding to the public opinion or the priorities of coastal states that may be most affected by these plans. Even as coastal states move towards encouraging offshore wind, the Trump Administration nonetheless seems to oppose and undermine these efforts, instead choosing to pursue unpopular development goals.

The structures necessary for implementing the European model for regulation into the United States' framework already exist. By integrating ecosystem-based management into regional ocean partnerships and by encouraging collaboration and the exchange of information between the federal oversight committee and stakeholders, the United States' ocean management can embrace principles of sustainable development in the face of a changing energy and environmental landscape.

## **VII. Conclusion**

Although the regime for managing oceans and offshore energy development are complex internationally and within the United States, some regulatory structures have proven to be both successful and adaptable in a changing energy landscape. The European Union provides a useful model for regional collaboration and marine planning, a model that could be adapted to the United States to ensure sustainable marine management as more offshore lands are opened to energy development. Many of the structures that would encourage this development have already begun to form within the United States, enabling the exact kinds of management embraced by the European model.